L. H. 1826.

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# TREATISE

ON THE

# LAW OF AUCTIONS.

WITH

## AN APPENDIX

OF

*PRECEDENTS.*

BY RICHARD BABINGTON, ESQ.

OF THE MIDDLE TEMPLE, SPECIAL PLEADER.

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# PREFACE.

To the Profession of which he is a member, the Author commits this little Volume, with that anxiety and diffidence which naturally attend a first effort to gain public favour, but at the same time with the most perfect confidence, that those imperfections which may be found in the following pages, will be viewed by that Profession with candour and indulgence.

The Author will not attempt to frame an apology for the publication of this Treatise, well knowing that, in the absence of intrinsic merit, his views and motives can never entitle it to favour.

The many important decisions which have at different times been made upon the Law of Auctions, and the various acts of parliament which have from time to time been passed for regulating auction sales, are in this work, for the first time, brought together. Those cases which have been over-ruled are referred to very briefly, while on the other hand the cases which are yet considered as law are generally stated rather fully, and the language of the courts is retained as far as possible.

Since that portion of the Work went to the press, in

which the practice of puffing at auctions is treated (p. 52), and in which the Author has expressed an opinion, that the appointment of *one* puffer is illegal, the question has come before Lord Chief Justice Best at *nisi prius*, in the case of Crowther *v.* Austin, which was an action brought by the vendor against the purchaser of a horse sold by auction, to recover the price; when his Lordship nonsuited the plaintiff, on the ground that a puffer had been employed by him to bid at the sale, and has thus sanctioned the Author's opinion. Upon a motion which was made in the last term, for a rule to shew cause why the nonsuit should not be set aside, the Court of Common Pleas granted the rule *nisi*, in order to settle the question; but all the Judges declared so decided an opinion that the nonsuit was right, that it is believed the plaintiff's counsel do not intend to bring the case again before the Court.

HARE COURT, TEMPLE,
*2d March*, 1826.

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# TREATISE

ON

# THE LAW OF AUCTIONS.

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## CHAP. I.

### OF THE NATURE OF A SALE BY AUCTION, AND WHAT IS ESSENTIAL TO RENDER THE SALE BINDING.

#### SECT. 1.—*Of the Manner of conducting Sales by Auction.*

SALES by auction appear to have been common in all ages and countries; thus at the time when the power of the Roman soldiery was at its greatest height, we find the Prætorian bands proclaiming that the Roman world was to be disposed of to the highest bidder by public auction, a vacancy in the imperial dignity having been occasioned by the death of Pertinax, who had fallen a victim to their licentious fury.

Although the mode in which sales by auction were conducted among the ancients is now rather matter of curiosity than utility, it is believed that the classical reader will readily excuse the following

statement; and it is confidently trusted that the severe legal student will pardon it on account of its brevity.

In the Roman sales, a spear was fixed in the forum, by which stood a crier, who proclaimed the articles which were intended to be sold. A catalogue was made in tables, called *Auctionariæ*. The seller was called *auctor*, and the bidders *sectores*. They signified their biddings by lifting up their fingers, and the highest bidder became the purchaser. About the forum, were a number of silversmiths' or rather bankers' shops, where things sold by auction were registered and sealed; and at these shops, the auctions were in general made, in order that these argentarii might note on the tables the names of the buyers. The permission of the magistrate was necessary for a sale; and after the goods were sold, they were delivered under his authority. *Buying in*, or redemption, was made by giving security through a friend, which was termed, '*Dejicere libellos*.' Petronius gives a handbill of an auction literally thus: "Julius Proculus will make an auction of his superfluous goods to pay his debts." Estates, pictures, &c. were sold by the Romans in this way; and sales sometimes lasted two months.

In the middle age the goods were cried and sold to the highest bidder, and when he was declared the purchaser, a trumpet was loudly sounded. The use of the spear was retained, the

auctions being called *subhastationes;* and the *subhastator*, or auctioneer, was sworn to sell the goods faithfully. In Nares we find the expression, "sold at a pike or spear," *i. e.* by public auction or outcry; and auctions called *portsales*, because originally perhaps sales made in ports. The crier stood under the spear, as was the case among the Romans at an earlier period; and was in the thirteenth century called *cursor*.

The mode of conducting sales by auction at the present day varies in different parts of the world; in England the usual mode is this: a person employed by the vendor, and who is called an auctioneer, publicly offers for sale the property intended to be sold, when the persons desirous of purchasing bid one after another, each succeeding offer being higher than the preceding one, and the highest bidder is declared the purchaser. A practice materially differing from this prevails in Holland, where the estate is put up at a high price, and if nobody accepts the offer, a lower is named, and so the sum first required is gradually decreased till some person close with the offer. Thus of necessity there is only one bidding for the estate.

A mode of sale somewhat resembling the latter is adopted in some counties in England, upon sales of estates for the redemption of land-tax: the auctioneer states the sum of money wanted and the number of acres to be disposed of, and the person who will accept the least quantity of land for the

sum required is declared the purchaser; so that the persons desirous of purchasing bid downwards, until some one name a quantity of land less than any other person will take.

Sales by auction of the post-horse duties, partake of the nature both of English and Dutch auctions. The duties are put up at a large sum named in the particulars, and the sale is then conducted precisely in the same manner as a Dutch auction; but when any person actually bids, others may advance on that bidding, and the highest bidder is declared the purchaser, just as if the sale had been conducted in the usual way.

## SECT. 2.—*Of the Parties to the Sale.*

To render a sale by auction valid, it is necessary that the parties to the sale should be persons able to contract, and not labouring under any of those disabilities by which the law in some cases restricts, and in others entirely takes away, the right of particular individuals to enter into contracts, or prevents them from ever acquiring a right to contract. Generally speaking, all persons, except infants and married women, having capacity and understanding, may, by mutual assent, become parties to a contract, and bind themselves and their personal representatives to a performance thereof.[a]

But although generally speaking infants and

[a] 1 Bac. Ab. tit. Agreements, A.

married women cannot legally enter into contracts, yet there are some cases in which, as it will appear hereafter, they may.

1. *Of Infants.* By the common law a person is called an infant till he attains the age of 21 years. And it is a rule of law, that all contracts with infants, except for necessaries, are either void or voidable. The reason upon which this rule is founded, has its origin in that spirit of indulgence which the law has always thought fit to show to infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and, in the care it takes of them, in preventing them from being imposed upon or over-reached by persons of more years and experience. If an infant, who is a tradesman, buys goods and wares for the use of his shop, the contract will not bind him. This was decided in the case of Whittingham *v.* Hill,[a] which was an action of assumpsit for goods sold: the defendant pleaded that he was an infant; the plaintiff replied that the goods were for the necessary diet and apparel of the defendant and his family; the defendant rejoined that he kept a mercer's shop at Shrewsbury, and bought the goods to sell again, and traversed that he bought them *pro necessario, &c.*: the plaintiff thereupon demurred; and after argument it was adjudged for the plaintiff. But afterwards upon a writ of error the judgment was reversed: and the Court said: "This buying

[a] Cro. Jac. 494.

for the maintenance of the defendant's trade, though he gained thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but for his necessity, viz. diet and apparel, or necessary learning."

And although an infant is liable to an action for any *tortious* act which he may commit, yet a contract made with an infant cannot be converted into a *tort*, so as to make him liable in that form of action.

Therefore, where a plaintiff brought an action on the case against an infant, for an injury done to a horse which the plaintiff had let to the defendant to hire, it was held that the defendant might plead his infancy in bar, the action being founded on a contract. And Lord Kenyon, Ch. J. said, "The law of England has very wisely protected infants against their liability in cases of contract; and the present is a strong instance to show the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened, the mare being strained: and the question is, whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield indeed

frequently said, that this protection was to be used as a shield, and not as a sword; therefore, if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract: and the words 'wrongfully, injuriously, and maliciously,' introduced into this declaration, cannot vary the case." And Grose, J. said, that in the case of Manby *v.* Scott,[a] the distinction was taken, that if the action against an infant be grounded on a contract, the plaintiff shall not convert it into a tort.[b]

But infancy is a personal privilege of which no one can take advantage but the infant himself; and therefore, though the contract of the infant be voidable, yet if entered into with a person of full age it shall bind him; for being an indulgence which the law allows infants, to protect and secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of full age, who are presumed to act with sufficient caution and security; and were it otherwise, this privilege, instead of being an advantage to the infant, might in many cases turn greatly to his detriment.[c]

[a] 1 Sid. 109. [b] Jennings *v.* Rundall, 8 Term Rep. 335.
[c] Comyn on Contracts, 2d ed. 621.

It is clearly settled that a contract entered into by an infant for necessaries is neither void nor voidable: indeed if such a contract could be avoided, it has been justly observed by Lord Mansfield, "that miserable must the condition of minors be, excluded from the society and commerce of the world, deprived of necessaries, education, employment, and many advantages, if they could do *no* binding acts. Great inconvenience must arise to *others*, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts *for their own benefit*, and without prejudice to themselves, for the benefit of *others*."[a]

Therefore a contract entered into by an infant for his necessary diet, apparel, washing, lodging, or education, will bind him.[b] So will a contract for physic; or if he be a housekeeper, a contract for necessaries for himself, his wife, and family.[c]

In all cases what are necessaries is a question for the Jury to determine; in determining which they will consider the infant's estate and condition.

As the privilege which the law allows to infants is intended entirely for their benefit, and to prevent them from being imposed upon during their *minority*, they are at liberty upon their coming of age

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[a] Zouch *v.* Parsons, 3 Burr. 1801.
[b] Co. Litt. 172, *a*. [c] 1 Stra. 168.

either to affirm or to disaffirm the contracts entered into during their minority: therefore it has been held that if *goods*, which are not necessaries, are delivered to an infant, who after full age ratifies the contract by a promise to pay, he will be bound by such promise.[a]

If an adult and an infant jointly enter into a contract, an action cannot be maintained against them both, but the adult should be sued alone, as being the sole contracting party.

Thus in the case of Chandler *v.* Parkes and Danks,[b] which was an action of assumpsit for work and labour, and materials found, the defendant Parkes pleaded the general issue, and Danks the other defendant pleaded infancy. The plaintiff entered a *nolle prosequi* as to the defendant Danks, and proceeded to issue with the other defendant. Lord Kenyon, on the case being opened, and looking into the record, said, he doubted how the plaintiff could recover against one defendant only, in an action on a contract which he by his declaration had stated to be a joint one against two: that the infancy being admitted, the plaintiff ought to have discontinued, and commenced a new action against the adult defendant, as being the sole contracting party according to the legal effect of such a contract, which was void against the infant de-

[a] Southerton *v.* Whitlock, 1 Str. 690. Borthwick *v.* Carruthers, 1 T.R. 648.
[b] 3 Esp. Rep. 76.

fendant. The plaintiff's counsel contended, that the promise was not void, but voidable only; and if the plaintiff had declared against the adult defendant only, he could have pleaded in abatement, that the contract was a joint one, and quashed the plaintiff's writ. Lord Kenyon said, he continued of the same opinion; for the plea in abatement could not prevail, when it was disclosed that the other defendant was an infant; and his Lordship nonsuited the plaintiff.

This decision of Lord Kenyon's was afterwards recognised at Nisi Prius by Lord Ellenborough,[a] and has since been confirmed by the Court of Common Pleas.[b]

2. *Of married Women.*—A married woman has no power to make a contract without the authority or assent of her husband, precedent or subsequent, express or implied; therefore if she enters into any contract without such authority or assent, it is absolutely void.[c] And the husband may maintain an action of trover for goods which have been sold by his wife without his assent.[d] But a contract made by a married woman with the assent of her husband, is considered as the contract of the husband, and will bind him.[e]

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[a] Jaffray *v.* Frebain and others, 5 Esp. 47.

[b] Gibbs *v.* Merrill, 3 Taunt. 307. Burgess *v.* Merrill, 4 Taunt. 468.

[c] Manby *v.* Scott, 1 Sid. 120. 1 Lev. 4. 1 Mod. 128.

[d] Com. Dig. tit. Baron & Feme.

[e] 4 Vin. Ab. tit. Baron & Feme, E. *a.* pl. 20. 3 Bulst. 90. 1 Str. 80.

Whilst a *feme covert* cohabits with her husband, he is chargeable for all contracts made by her for necessaries, as meat, drink, clothes, &c. suitable to his estate and condition in life, his assent thereto being presumed on account of the cohabitation, unless the contrary appear. But such contracts are considered as the contracts of the husband, and he alone is chargeable.

If a married woman elopes from her husband and afterwards contracts a debt, not only the husband is not liable, but the wife cannot be sued either alone or jointly with her husband.[a]

If husband and wife be separated by mutual consent, and the husband secures to her a separate allowance by deed, and this is generally known in the place where he lives, he is not liable for necessaries furnished his wife, even in a strange place where the circumstances of the separation are wholly unknown. But if the wife immediately after the separation, and before it can be publicly and generally known, purchase necessaries upon credit, the husband will be liable.[b]

So the husband will be liable for necessaries furnished to his wife, if he fails to pay the stipulated allowance.[c]

Where a husband, either from ill treatment

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[a] 2 Black. Rep. 1079. Sed. vide Cox *v.* Kitchen, 1 Bos. & Pull. 338.

[b] Todd *v.* Stokes, 1 Lord Raymond, 444. 12 Mod. 244. 4 Camp. 70. 4 Bar. & Ald. 252.

[c] Nurse *v.* Craig, 2 New Rep. 148.

compels his wife to leave his house from motives of personal safety, or turns her out of doors, any person who furnishes her with necessaries correspondent to the rank and situation in life of the husband can compel him to pay for them.[a]

But no ill treatment short of personal violence, or such as will induce a reasonable fear of it, will justify a third person in providing a maintenance for the wife, so as to entitle him to maintain an action against the husband.[b]

In actions for necessaries it should be observed, that in all these cases the things supplied to the wife must be proved to be necessaries suitable to the estate and condition of the husband; for if they be not, he will be discharged. And though a husband is bound to provide necessaries for his wife as long as she cohabits with him, or whilst he absents himself from her, or she is obliged to live apart from him on account of his ill usage to her; yet if she *voluntarily* departs from his dwelling, and lives apart from him without his consent, he will not be liable for any debts which she may contract.[c]

By the custom of London, if a feme covert exercises a trade in which her husband does not at all concern himself, she may be sued as a feme sole, in the *city courts*, for debts contracted by her

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[a] Ewers *v.* Hutton, 3 Esp. 255.
[b] Horwood *v.* Heffer, 3 Taunt. 421.
[c] Comyn on Contracts, 607, 2d edit.

in carrying on that trade; and if she has not goods that are not her husband's, she must be imprisoned till she satisfies her creditors; and as she may be sued, so she may sue as a *feme sole* for debts owing to her in the way of her trade within the city.[a] But a *feme covert* sole trader cannot sue or be sued as a *feme sole*, even upon the custom of London, in the superior courts at Westminster; but her husband must be joined for conformity.[b]

In the case of banishment, abjuration, or exile of the husband, the law considers him as civilly dead, and therefore permits the wife to contract and sue, or to be sued as a feme sole.[c]

If a man allows a woman to use his name, and pass for his wife, he will be bound to pay for goods furnished to her, even by a man who knew that the parties were not married.

Thus in Watson *v.* Threlkeld,[d] which was an action of assumpsit brought to recover the amount of a quantity of linen-drapery goods, furnished by the plaintiff to a woman who passed for the wife of the defendant. The plaintiff proved the delivery to the woman at the defendant's lodgings; that he had himself chosen some of the articles for her; that she used his name, and was called Mrs. Threlkeld in his presence. The defendant grounded his defence on the fact that the woman was not his

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[a] 10 Mod. 6.

[b] Caudell, *v.* Shaw, 4 Term Rep. 361. Beard & Ux. *v.* Webb, 2 Bos. & Pull. 95.

[c] Co. Litt. 132, *b.* 133, *a.*

[d] 2 Esp. N.P.R. 637.

wife, though she lived with him as such, but was a kept woman; and that that circumstance was known to the plaintiff when the goods were furnished. It was then pressed by the defendant's counsel, that however it had been held, that if a man permitted a woman to use his name, and pass for his wife, he thereby subjected himself to the payment of her debts; it had only gone to those cases where the tradesman had not known the real situation of the parties, but believed the woman to be actually married; that it was meant as a punishment on the man, who, by permitting a woman to use his name, had thereby given her a false credit, derived from his situation in life, as passing for his wife; but in the present case, no such deceit was practised, no such false colours held out. The plaintiff knew the defendant was not married; so that he could not look to the man's credit, but to the woman's own; and that the plaintiff should therefore be nonsuited. Lord Kenyon said, "It is certain, that if a man has permitted a woman, to whom he was not married, to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts; and I am of opinion that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from his name and cohabitation; and it is not to be supposed that the tradesman could look to the credit of a woman of that description, and not to

that of the man by whom she was supported. I shall hold the credit to be given to him, and that he is liable." His Lordship added, "What however I have said must not be taken to be the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family."

3. The contracts of idiots, lunatics, or other persons labouring under a defect in the understanding, of such a nature as to render them incapable of comprehending the engagements they enter into, are not absolutely void, but may be avoided.[a]

So may a contract entered into by a man when he is so drunk as to be wholly unable to understand what he is doing.

Thus in Pitt *v.* Smith,[b] where the declaration stated that a certain agreement was entered into between the plaintiff as an agent and the defendant, for the sale of an estate; and that the defendant afterwards published a libel concerning the plaintiff, alleging that he had induced the defendant to execute this agreement when in a state of intoxication. To which the defendant pleaded the general issue. The attesting witness to the agreement being called, he was asked in cross-examination, whether the defendant was not actually in a state of complete

[a] Yates *v.* Boen, 2 Stra. 1104.

[b] 3 Camp. 33. Coles *v.* Robins, Bull. Ni. Pri. 172.

intoxication when he executed the agreement. The plaintiff's counsel insisted that this question was irregular, there being no justification on the record; but Lord Ellenborough said, "You have alleged that there was *an agreement* between the parties; and this allegation you must prove, as it is put in issue by the plea of Not guilty: but there was no agreement between the parties, if the defendant was intoxicated in the manner supposed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise." It appeared that the defendant had become quite drunk in the company of the plaintiff before signing the agreement. Whereupon his Lordship directed a nonsuit, which the Court of King's Bench in the ensuing term refused to set aside.

4. Persons under judgment of outlawry, attainder of treason or felony, are incapacitated from making a contract for their own benefit; for being considered in law as civilly dead, they cannot sue in any court of law; indeed their property, as well as all rights of action in respect thereof, are vested in the Crown.[a]

5. An alien friend is allowed to buy and sell personal property, and to maintain actions in our courts of law upon any contracts of that descrip-

[a] See Bullock *v.* Dodds, 2 Barn. & Ald. 258, and the cases there cited.

tion into which he may enter;[a] but it is a general rule of law, that no action will lie by or in favour of an alien enemy.[b]

And although both alien friends and alien enemies may purchase real property, yet they cannot hold it, but upon an office found, the king will be entitled to it.[c]

6. And lastly, every person professing the Popish religion, who has not taken the oath prescribed by the 31st Geo. III. c. 32, although he may purchase lands, can only hold them for the benefit of his Protestant next of kin until his conformity, for the benefit of himself after his conformity, and for the benefit of his heir after his death.

## SECT. 3.—*Of the Conditions of Sale.*

THOUGH it does not appear to be essential to the validity of a sale by auction that the terms on which the vendor proposes to sell, and which are usually called "The Conditions of Sale," should be reduced into writing, printed, and publicly exposed to view previous to the sale; yet in order to avoid any difficulty, and to guard against any disputes which might otherwise arise, it is in all cases prudent and advisable that the *conditions of sale* should be printed, and publicly exposed to view in

[a] Dyer, 2, *b*. Co. Litt. 129, *b*.

[b] Brandon *v.* Nesbitt, 6 Term Rep. 23, and the cases there referred to. See also Bristow *v.* Towers, ib. 35.

[c] Co. Litt. 2, *b*.

the auction-room, that the public may know on what terms they bid. And as it is an established rule in courts of law, that the printed conditions of sale are binding on both the vendor and purchaser, and that neither party can be permitted to give evidence of any thing *said* at the time of the sale, to add to or vary such printed conditions, the greatest accuracy and attention should be observed in drawing up the conditions of sale, in order not only that they should comprise all the terms on which the parties contract; but that such terms should be expressed in language so clear and unambiguous, that no doubt shall arise as to the intention of the parties.

The above position, that neither the vendor nor the vendee can be permitted to travel out of the printed conditions of sale, and insist on any thing that was said by the auctioneer or other person at the time of the sale, in any respect varying or adding to the printed conditions, is fully illustrated by the following cases.

In Gunnis *v.* Erhart,[a] where copyhold lands had been sold by auction, and in the printed conditions of sale were stated to be *free from all incumbrances*, and the purchaser on discovering that there was a charge on the estate of 17*l.* per annum refused to complete the purchase, and thereupon the vendor brought his action, and upon the trial offered to give in evidence that the auctioneer had publicly declared from his pulpit in

[a] 1 H. Black. 289.

the auction-room, when the estate was put up, that it was charged in the manner above specified; Lord Loughborough refused to admit such evidence, and the plaintiffs were nonsuited: and upon a motion for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, the Court of Common Pleas said, they were clearly of opinion that the evidence was not admissible, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room *contrary* to the printed conditions of sale.

And in Powell *v.* Edmunds,[a] where the plaintiff declared, that on the 14th of April, 1806, he was entitled to sell timber trees growing in a certain close, &c. and authorised his auctioneer, in that behalf, to sell by auction the said timber, subject to certain conditions of sale, by which it was provided, (*inter alia*) that the timber should be put up in two lots, and that the purchaser should pay down to the auctioneer 10*l.* per cent. in part of his purchase money, and sign an agreement for the payment of the remainder by the 25th of March, 1807. He then averred, that the defendant became the purchaser at the sale of lot 1, for 700*l.*, and in part performance of the conditions of sale deposited 70*l.* and signed an agreement to fulfil the conditions of sale; and in further performance of the conditions, paid to the plaintiff in part

[a] 12 East, 6.

of the said purchase money 529*l.*; but, though after the sale and after his undertaking, viz. on the 1st of Sept. 1807, the defendant, with the plaintiff's permission, entered on the said close, and cut down, converted, and carried away the said timber trees, yet he did not, on or before, or since, the 25th of March, 1807, pay to the plaintiff 101*l.* the residue of the 700*l.* At the trial, before Thomson, B. at Hereford, the auctioneer proved that he was employed by the plaintiff to sell the timber for him: that the sale, which had been previously advertised, took place on the 14th of April, 1806: that written conditions of sale were then publicly read; which conditions were produced by him, together with the advertisement to which they referred, and which merely described the time and place of sale, and the number and kind of timber trees in each lot, saying nothing as to the weight of the timber. The defendant was the highest bidder for lot 1, at 700*l.*, and signed the agreement for that lot, upon the back of the conditions of sale. The auctioneer, on cross-examination, was asked, whether when the bidding amounted to 550*l.* any conversation took place from him to the company, as to what quantity of timber was contained in the lot; and this question having been objected to on the part of the plaintiff, the defendant's counsel stated, that they proposed to shew that there was a warranty by the auctioneer, that the quantity of timber con-

tained in lot 1 would amount to eighty tons. The plaintiff's counsel still objected to such evidence, there being no such warranty contained in the printed conditions of sale; but stated that, if it were necessary, they were prepared to shew that the defendant had carried away the whole timber. The learned Judge, however, was of opinion, that parol evidence of the warranty as to quantity was inadmissible; and the plaintiff had a verdict for 101*l.*, which was the whole balance remaining unpaid: and upon a motion for a new trial, Lord Ellenborough said, "There is no doubt that the parol evidence was properly rejected in this action. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of timber would *vary* the agreement contained in the printed conditions of sale. The only question which could be made is, whether if by a collateral representation a party be induced to enter into a written agreement different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence. It is not necessary, however, to discuss that at present."

And to shew how strictly the before-mentioned rule is adhered to, it has even been held, in a case where the printed conditions of sale were ambiguously worded, that the declarations of the auctioneer at the time of the sale, explaining such ambiguity, could not be given in evidence.

The case alluded to is that of Jenkinson *v.* Pepys,[a] in which it appeared, that on a sale by auction of an estate, upon which there was a considerable quantity of timber and underwood, the conditions of sale were ambiguously worded as to the woods; but it was quite clear that the purchaser was to pay for timber and timber-like trees. It was proved, that the auctioneer at the time of the sale declared that he was only to sell the land, and that every thing growing upon the land must be paid for by the purchaser. The defendant, who was the purchaser, contended that he was only to pay for timber and timber-like trees, and not for the plantation and underwood. And the Court of Exchequer held, that the evidence of the auctioneer's declaration was not admissible.

Neither does it make any difference in the application of the above rule, or open the door to the admission of verbal declarations made at the time of the sale, that by the printed conditions of sale the parties have agreed to be bound as well by the verbal declarations of the auctioneer, made at the time of the sale, as by the printed conditions.[b]

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[a] 6 Ves. Jr. 330, cited; 15 Ves. Jr. 521, stated.

[b] Higginson *v.* Clowes, 15 Ves. Jr. 516.

But parol evidence is admissible in a court of equity, in opposition to a specific performance, to shew mistake or surprise as well as fraud.*

Though it be provided by the conditions of sale, (as it generally is, and indeed ought always to be,) that no error or misstatement in the description or particular of the property shall vitiate the sale, but that an allowance shall be made for such error or misstatement in the purchase money, this provision will only extend to such errors or misstatements as may be inserted through ignorance or inadvertency, and the sale will still be vitiated by any misstatement, designedly and fraudulently introduced, with a view to raise the apparent value of the property.

Thus where an estate was described in the conditions of sale, as *situated between London and Brighton, being about one mile from Horsham, four from Crawley, &c.*, and among the conditions of sale was the following: "If through any mistake the premises should be improperly described, or any error or misstatement be inserted in this particular, such error shall not vitiate the sale thereof, but the vendor or purchaser, as the case may happen, shall pay or allow a proportionate value according to the average of the whole purchase money, as a compensation either way;" but the purchaser finding that instead of the estate being only one mile from Horsham, it was between three and four, refused to complete the purchase, and

* Stangroom v. Townshend, 6 Ves. 328.

brought an action against the vendor to recover his deposit; Lord Ellenborough said, in cases of this sort he should always require an ample and substantial performance of the particulars of sale, unless they were specifically qualified. Here there was a clause, providing that any error in the description of the premises should not vitiate the sale, but that an allowance should be made for it. This, his Lordship said, he conceived was meant to guard against *unintentional errors*, and not to compel the purchaser to complete the contract if he had been *designedly misled*. His Lordship therefore left it to the Jury to say, whether this was merely an *erroneous statement*, or the misdescription was *wilfully* introduced to make the land appear more valuable from being in the near neighbourhood of a borough town. In the former case the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit.[a]

The Court of Chancery will not restrain a purchaser from proceeding at law to recover the deposit money, where the description in the printed particular of sale is calculated grossly to deceive a vendee as to the real nature and value of the estate sold: nor will the Court decree a performance with compensation, where there is an intentional misrepresentation, though by the conditions "any error or misstatement" is provided for.[b]

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[a] Duke of Norfolk *v.* Worthy, 1 Camp. Ni. Pri. Rep. 340.

[b] Stewart *v.* Alliston, 1 Mer. 26.

Thus where certain freehold and copyhold estates belonging to the plaintiff were put up to sale by public auction, and the defendant signed an agreement to become the purchaser of a part of those premises, and paid the deposits agreeably to the conditions of sale. The premises so purchased by him were described in the printed particulars as "*a copyhold estate, consisting of seven dwelling-houses with gardens, on a ground-rent lease at forty guineas a year;*" and, in other part of the same particulars, as "*an eligible copyhold estate, comprising seven dwelling-houses with gardens and right of common, let on lease, for a term, whereof fourteen years were unexpired, at a nett annual ground-rent of 42l. held under the manor of Westham, subject to a small annual quit-rent, and to a customary fine on death or alienation.*" By the conditions of sale, the purchaser was to be entitled to the rents and profits from Christmas, 1814; and it was declared, that "if any error or misstatement should be inserted in the particulars, the same should not vitiate the sale, but a proportionable allowance was to be made as a compensation either way." A bill in equity was filed by the vendor, which, after stating that, immediately after the sale, an abstract was delivered to the defendant whereby a good title had been made, prayed a specific performance, with compensation in case of error in the description affecting the value, and an injunction to restrain the defendant from proceeding in an action at law, which he had

commenced to recover the amount of the deposit. To this bill the defendant put in an answer, admitting the plaintiff's title to the premises, but alleging that at the time of making the purchase the defendant had never seen the premises, but relied altogether on the accuracy of the printed particulars, and estimated the value of the premises upon the supposition that the said sum of 42*l.* was payable by way of ground-rent, and not of rack-rent, and that he would be entitled not only to such ground-rent during the remainder of the term, but, at the expiration thereof, to the annual value of the tenements since erected, which (he supposed) would greatly exceed the amount of such ground-rent; but that, on the contrary, he had since discovered, and the fact was, that no ground-rent whatever was reserved on the premises, and that the sum of 42*l.* was the full and utmost annual rack-rent, both of the ground and buildings thereon, reserved by a lease made long since the buildings were erected, in the ordinary way of demise, and much more than the actual value thereof, the buildings being very mean, and much out of repair, &c.

The Lord Chancellor said,—"In this case, the question of construction is a pure legal question. It is true that, in many instances, the Court has interfered by injunction after bill filed, and has even decreed a specific performance, where the action at law might otherwise have been maintained. Lord Thurlow used to say, that the juris-

diction of a court of equity to compel a specific performance, must have been founded upon the notion of its being against conscience to take advantage of small circumstances of variation in the description of the thing contracted for; and that the principle being once established, was gradually enlarged, till a specific performance in equity became at length a performance of any thing rather than the real contract between the parties. Such are the cases of the house and wharf before Sir Thomas Sewell, of the estate purchased as an estate in Essex, which turned out to be in Kent; and the case of Lord Stanhope, whose object was to get an estate tithe free, and who was made to take the estate subject to tithe with a compensation.[a] There is no instance, however, in which the Court has enjoined, where it appears upon the face of it that the action commenced must effect the object of obtaining the judgment of a court of law on the whole case. In the present case, the question being the real meaning of the phrase used in the description of the estate sold, the Court will say, that if the question can be clearly and solely raised by the action at law, that action ought to be suffered to proceed. I am of opinion, that the single question is, what was the subject represented to be at the time the contract was made; not what did it turn out to be at any subsequent period when it came to be looked into. Upon this

[a] All these cases are cited by the Chancellor in Drewe v. Hanson, Ves. 678.

question, the principle of construction must be the same at law and in equity; and unless pressed for my opinion respecting it, I am bound to do nothing further at present than to refuse the injunction." The parties having expressed a wish to have the question disposed of, his Lordship gave judgment as follows: "I think that the property which is the subject of this application has been represented to be that which it is not in fact; and, even if a court of law should judge otherwise, I should have great difficulty in decreeing a specific performance, where the description is at the least of so ambiguous a nature, that it cannot with certainty be known what it was that the purchaser imagined himself to be contracting for. But what in fact, does the word mean which is here employed? Would any man, seeing a house put up to auction as a house to be sold, subject to a ground-rent lease, suppose that the word ground-rent meant rack-rent? The case in Strange [a] proves that the same words may bear different meanings with reference to the context; but according to the construction here contended for, the word would have no meaning at all. The subject of the contract, therefore, does not answer the vendor's description of it, and that in a point so material as to exclude the doctrine of compensation, which ought never to be applied to a case like the present." [b]

If the conditions of sale are printed and pasted

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[a] 2 Stra. 1020.

[b] Stewart *v.* Alliston, 1 Mer. 26.

up under the auctioneer's box, and the auctioneer states that they are so pasted up, and are in the usual form, this will be sufficient notice to purchasers of the conditions.

Thus in Mesnard *v.* Aldridge,[a] which was an action on the case on the warranty of a horse. It appeared that the horse was sold by the defendant by auction at his repository, and warranted sound. The sale took place on the Wednesday, and at the time of the sale the auctioneer announced that the conditions of the sale were as usual. These conditions of sale were proved to be contained in a printed paper, pasted up under the auctioneer's box; and by one of them, all horses purchased there, in case of any unsoundness discovered, were required to be returned before the evening of the second day after the sale. The horse in question was not returned till the Saturday, when the plaintiff was informed that it was too late, as it ought pursuant to the conditions of the sale to have been returned on the evening of Friday. Lord Kenyon said, "In this case it is proved that printed particulars of the sale are pasted up in the public sale room, under the auctioneer's box. In the case of carriers, who advertise that they will not be liable for goods lost above the value of *5l.* unless entered as such, the posting up of a bill in the coach office to that effect has been held to be sufficient. I therefore think the same mode being adopted here,

[a] 3 Esp. Ni. Pri. Rep. 271.

gives the same degree of notice to all persons who come to this sale, and that it is a sufficient notice of the conditions under which the horses are sold. With respect to the main point, when parties enter into a special agreement, they must adhere to the terms of it. Here there is a condition that the party purchasing must return the horse within two days, which he has not done. I therefore think the plaintiff must be nonsuited."

It is usually and very properly made one of the conditions of sale, that no person shall retract his or her bidding; if this were not done, every bidder would be at liberty to countermand his offer at any time before the hammer was down, notwithstanding one of the conditions of sale might be, that the highest bidder should be the purchaser.

Thus in the case of Payne *v.* Cave,[a] which was an action of assumpsit for not paying a deposit upon a lot of goods sold by auction, which consisted of a worm tub and other articles; the circumstances of the case were these: the goods were put up in one lot by auction; there were several bidders, of whom the defendant was the last, who bid 40*l.*; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? You will not get more." The auctioneer said he was informed the worm weighed at least 1300 cwt. and was worth more than 40*l.*; the defendant then asked him whether he would warrant it to weigh so much,

[a] 3 Term Rep. 148.

and receiving an answer in the negative; he then declared he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30*l.* and the action was brought for the difference. Lord Kenyon, Ch. J. before whom the cause was tried, being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff. A motion was afterwards made in the Court of King's Bench for a rule to set aside the nonsuit, on the ground that the bidder was bound by the conditions of sale to abide by the bidding, and could not retract. But the Court refused the rule, and said, "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus penitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer and the other not, which can never be allowed."

Upon the sale of goods it is usual to insert a clause in the conditions of sale, that the goods shall be taken away at the purchaser's expense within a certain time, and paid for previous to their being removed, and that if they are not taken away within

the time limited the deposit money shall be forfeited, the goods resold, and the loss, if any, occasioned by such resale, made good by the purchaser; and it has been held, that where a condition of this sort is inserted, the purchaser has the whole of the time mentioned in the condition to remove the goods, but that the vendor is bound to deliver them at any time within the period mentioned, upon being requested so to do.

Thus in Hagedorn *v.* Laing[a] it appeared that the defendant had bought a quantity of hemp by auction, upon the conditions (amongst others) that it was to be cleared away at the buyer's expense in fourteen days, and the price paid on or before delivery. If any lots remained uncleared after the time allowed, the deposit money should be forfeited, the goods resold, and the loss on resale made good by the present purchaser. It was proved on the trial that the goods were put up to sale on the above conditions, and that the defendant was the highest bidder. He applied to take away the hemp immediately after the sale, but it was then in pawn for certain duties which must be paid before it could be delivered, and he was therefore unable at that time to obtain it. The broker employed by the vendor gave the defendant a bought note, describing the goods as bought of himself, upon the terms, amongst others, that fourteen days were to be allowed for receiving and delivery. The goods were,

[a] 6 Taunt. 161.

after the expiration of the fourteen days, resold by the vendor, and an action brought to recover the loss occasioned by such resale. At the trial, Gibbs, Ch. J. thought that the fourteen days were allowed to the purchaser as a convenience to him for carrying away the goods, but that the seller was bound to deliver them at the first or any moment of the fourteen days; it was impossible that the seller should have till the last moment of the fourteen days for delivery, since the purchaser, upon not taking the goods away within the fourteen days, was to forfeit his deposit. The Jury found a verdict for the plaintiff, subject to the point reserved, whether the plaintiff, under these circumstances, was entitled to recover: and after argument in the Common Pleas, the Court said, "The main question is on the construction of this contract, as it is to be collected from the conditions of sale, and the bought and sold note; and taking the two together, we think it is clear, not that the seller should have fourteen days to deliver the goods, but that the purchaser should have fourteen days to take them away. He must have a reasonable time within which he may take them away. The seller may be ready to deliver them at any time. If the purchaser do not take them away within the stipulated time, a penalty is inflicted on him: he forfeits his deposit; he is to pay the loss on a resale, and interest on the loss."

A stipulation ought always to be inserted in the

conditions of sale of real property, that an abstract of the title shall be delivered by the vendor to the purchaser within a limited time, and that the vendor will deduce a good title to the premises sold.

If the vendor does not shew a clear title by the day specified in the conditions of sale, the purchaser may recover back his deposit and rescind the contract,[a] without waiting to see whether the vendor may ultimately be able to establish a good title or not.[b]

And in an action for the recovery of the deposit a court of law will collaterally inquire whether the title be good in equity; for a contract to make a good title, means a good title both at law and in equity; and a court of law will adjudge a title to be either good or bad, having no middle term for it.[c]

In one case,[d] where the conditions of sale contained a proviso that, in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or the purchaser should not pay the purchase money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon. The Court of Common Pleas held, that such con-

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[a] Berry *v.* Young, 2 Esp. Ni. Pri. Rep. 640, *n.*

[b] Wilde *v.* Forte and others, 4 Taunt. 334.

[c] Maberley *v.* Robins, 5 Taunt. 625. 1 Marsh. 258. Elliott *v.* Edwards, 3 Bos. & Pull. 181. See also Cane *v.* Baldwin and others, 1 Stark. Ni. Pri. Rep. 65.

[d] Roberts *v.* Wyatt, 2 Taunt. 268.

dition gave an option to the vendor to rescind the sale in case the vendee did not pay the money, and to the purchaser to rescind in case the vendor did not make a title, but not *vice versa*.

Where an estate is sold in a great number of lots, so that a small purchaser cannot have the custody of the title deeds, he is entitled to attested copies at the expense of the vendor,[a] provided no stipulation has been made upon the subject; and as in some cases the expense of such copies may be very large, it is prudent on the part of the vendor to stipulate, that all attested copies which the purchaser may require shall be taken either at his own sole expense, or at the joint expense of the vendor and purchaser. If such a condition is inserted, the purchaser will not be likely to call for any attested copies which he does not really think necessary.

Although the auctioneer is by the acts of parliament relating to sales by auction made liable to the payment of the auction duties, yet he is empowered to recover the same from the vendor; therefore, unless the vendor intends to pay the whole duty himself, it should be provided by the conditions of sale, either that the purchaser shall pay the whole of it, or some and what proportion.

To enable the vendor or auctioneer to do this,

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[a] Dare *v.* Tucker, 6 Ves. Jr. 460. | Broughton *v.* Jewell, T. 1808. 15 Ves. Jr. 176.
Berry *v.* Young, 2 Esp. 640, *n.*

it was by the 17 Geo. III. c. 50, s. 8, enacted, as follows: "That nothing herein contained shall extend, or be construed to restrain any seller by auction, or person acting as auctioneer at any sales by way of auction, from making it a condition of sale, that the pound rate granted by this act, or any certain portion thereof, shall be paid by the purchaser, over and above the price bidden at such sale by auction; and in such case the person so acting as auctioneer is hereby authorised and required to demand payment of the said duty from such purchaser or purchasers, or such portion thereof, as expressed in such condition or agreement, and upon neglect or refusal to pay the same, such bidding shall be null and void to all intents and purposes."

And it has been held, that if the vendor fails to make out a good title by the time limited by the conditions of sale for his so doing, the purchaser may recover not only the sum paid as a deposit, but also the auction duty which he has paid.[a]

The construction of the word 'month' in conditions of sale depends upon the intention of the parties, which may be collected from the whole instrument.

Thus, where lands were sold by auction on the following terms (*int. al.*): That an abstract of the title should be delivered to the purchaser within a

[a] Cane v. Baldwin, 1 Stark. Ni. Pri. Rep. 65.

fortnight from the date thereof, and if he should think proper to take counsel's opinion, or compare the abstract with the title deeds, he should be at the expense thereof, and should return the abstract with or without his approbation at the end of *two months* from the date thereof; that a draft of the conveyance should be delivered to the purchaser or his attorney within *three months* from the date thereof; and should be delivered to Mr. C. within *four months* from the date thereof; and that the remainder of the purchase money should be paid on the *24th June* then next, when the purchaser should receive his conveyance, duly executed by all parties, to be prepared by Mr. C. at the expense of the purchaser. An action having been brought by the vendor against the purchaser, it appeared at the trial that the premises were sold by auction to the defendant on the *24th January*, 1811, at the sum of 1450*l.* and that the defendant then subscribed his name to the contract; that on the *7th February* following, an abstract of the title was delivered to him, which after some hesitation he received, and which being returned on the 9th by the defendant's attorney, with an indorsement made thereon, a fuller abstract was furnished him. The draft of the conveyance was delivered on the 24th of April 1811, and on the 30th the defendant declared that he would have nothing to do with the contract, and was unable to perform it. And it was objected that the plaintiffs could not main-

tain the action, not having complied with the terms of the conditions, by delivering the draft of the conveyance within the time stipulated, viz. *three months* from the date, which date was the *24th of January*. The delivery was on the *24th of April*, three *calendar* months after the date; but it was contended that the computation was to be made by *lunar* months. The objection was saved for the opinion of the Court, subject to which a verdict was given for the plaintiffs. And a rule which was afterwards obtained for entering a nonsuit was discharged, and Le Blanc, J. said, "In matters of contract the question will ever be what was the intention of the contracting parties at the time when they made use of the word. Looking at this case, I think the parties clearly had in their contemplation calendar and not lunar months. The date of the sale is the *24th of January*, and the conditions provide for the delivery of an abstract of the title to the purchaser within *a fortnight* from that date, which is to be returned by him at the end of *two months*. The draft is then stipulated to be delivered within *three months*, which is to be re-delivered to Colling within *four months*, and final payment to be made on the *24th June* following. This completes a period of exactly *five calendar months* from the date of the sale; and shews clearly that the parties had in their contemplation in the prior limitations of *two*, *three*, and *four months*, the same respective portions of time as in the ulti-

mate limitation, which is *calendar* and not *lunar* months."[a]

And a condition, "That if the purchaser shall fail to comply with the conditions the deposit shall be forfeited, and the vendor shall be at liberty to resell the estate either by public auction or private contract, and the deficiency, if any, occasioned by such resale, together with all the costs, charges, and expenses attending the same, shall be made good by the defaulter at this present sale," ought always to be inserted.

By virtue of this condition, in case the purchaser neglects or refuses to complete the purchase, the vendor may resell and recover the loss and expenses thereby occasioned and incurred from the purchaser. And if the money produced by the second sale exceed the original purchase money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.[b]

And if the purchaser break the condition and become a bankrupt, and the estate is resold at a less price than on the first sale, the expenses of the resale, &c. as they are in the nature of unliquidated damages, are not proveable under the commission; but the vendor may apply the money produced by such resale, first in discharge of such expenses, &c. which it is just that he should receive, but which

[a] Lang and another *v.* Gale, 1 M. & S. 111.
[b] Expte. Hunter, 6 Ves. Jr. 94.

he could not prove under the commission, afterwards in part discharge of the original purchase money, and may prove the balance under the commission.[a]

Where in the particulars of sale an express condition is inserted after some of the lots applying to those lots only, and which is not inserted after the other lots, but at the end of the particulars a similar condition is introduced, which is couched in general terms, such general condition will only apply to those particular lots, after which the express condition is inserted.

Thus, where there were several lots for sale, it was stated in the particular after two of them that the timber was to be paid for by the purchaser, but no mention was made of timber after the other lots, upon which there was a greater quantity, but there was a general condition that all the timber and timber-like trees should be taken at a fair valuation. The purchaser of the lots, to which no particular stipulation as to timber was annexed, objected to paying for the timber, contending that the value of it was included in his original purchase money: and the Master of the Rolls decreed in favour of the purchaser.[b]

If there is wood growing upon an estate, which it is intended should be taken by the purchaser at

[a] Expte. Hunter, 6 Ves. Jr. 94. Expte. Lord Seaforth, 19 Ves. Jr. 236. 1 Rose, 306.

[b] Higginson v. Clowes, 15 Ves. Jr. 516.

a valuation, it should be particularly described, as it is doubtful what wood will pass under the denomination of timber, the custom of the country making some trees timber which in their nature are not so, as birch, beech, &c.

Thus, where an action was brought to recover the value of certain pollard trees, on an estate purchased by the defendant of the plaintiff, in the particular of which it was expressed that all timber and timber-like trees should be taken at a fair valuation, the defendant resisted payment for the pollards, not deeming them to come under the general description of timber-like trees; but after a long hearing a verdict was given for the plaintiff for the value of the pollards.[a]

The sales of the East India Company being subject to a condition and regulation, that any buyer not making good the remainder of his purchase money on or before the day limited for such payment, shall forfeit the deposit, "and shall be rendered incapable of buying again at any future sale, until he shall have given *satisfaction* to the Court of Directors." It has been held, that the term *satisfaction* must be construed to mean pecuniary compensation for the non-performance of his agreement to pay on the appointed day, and that a buyer having made default on the day, but afterwards within a further time given him by the East India

[a] Rabbet *v.* Raikes, Suffolk Summer Assizes 1803, cor. Macdonald, C.B. Woodfall, L. & T. 224, 6th edit.

Company, paid the remainder of the purchase-money with interest, might maintain an action against the Company for refusing to allow him to become a bidder at their sales, such sales being by 9 & 10 Will. III. c. 44, declared to be public sales.[a*]

### SECT. 4.—*Of Biddings.*

A BIDDER may, as we have seen in the last section, retract his bidding at any time before the hammer is down, unless the conditions of sale contain an express stipulation to the contrary.[b] In order to bring a bidding within the acts of parliament relating to sales by auction, it must be named by the party at the auction *eo intuitu*, with a view to the purchase of the estate.

This was decided in the case of Cruso and another *v.* Crisp,[c] which was an action for money paid by the plaintiffs to the use of the defendant, and in which the plaintiffs recovered a verdict, sub-

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[a] Eagleton *v.* East India Company, 3 B. & P. 55.

[a*] By the 69th section of this statute it is enacted, "That all goods and merchandizes belonging to the Company to be erected, as aforesaid, or any other traders to the East Indies, and which shall be imported into England or Wales, as aforesaid, pursuant to this act, shall by them respectively be sold openly and publicly by inch of candle, upon their respective accounts, and not otherwise, upon pain that the same, or the value thereof, shall be forfeited and lost, to wit, one moiety thereof to His Majesty, his heirs and successors, and the other moiety thereof to any person or persons that will seize, inform, or sue for the same, by action of debt, or of the case, bill, plaint, or information, as aforesaid."

[b] Ante p. 30.

[c] 3 East. 337. Sed vide Walker *v.* Advocate General, 1 Dow. 111.

ject to the opinion of the Court of King's Bench, on the following case. One Mr. Maitland was employed by the defendant to sell an estate for him, and the plaintiffs being auctioneers, were employed to sell the same by auction. On the 18th of August, the auctioneer and other persons being assembled at the Crown Inn, at Lynn, for the purpose of the sale of the said estate by auction, Maitland publicly on the behalf, and as the known agent of the defendant, directed the auctioneer to put up the estate to auction in five lots, at certain sums then mentioned by him for each lot. No person having bid for any of the said lots, Maitland then publicly, on the behalf and as the known agent of the defendant, ordered the estate to be put up in two lots, at certain sums then mentioned by him for each lot. And no person having bid for either of the said lots, the estate was then put up by order of Maitland publicly, on the behalf and as the known agent of the defendant, in one lot, at a certain sum then mentioned by him: but no person bid for the same. The auctioneers returned no sale; but the Board of Excise called upon them for the duty, as upon a bidding of the owner by her agent Maitland, without notice given in writing. The auctioneers thereupon paid the duty, amounting to 45*l.* and brought this action to recover the same from the defendant; and the question for the opinion of the Court was, whether the plaintiffs were entitled to recover, and it was decided that they were

not; and Lord Ellenborough, C. J. said, "This was not a bidding by the agent for the owner, but something previous to the commencement of the bidding. In order to make it so, the sum must be named by the party at the auction *eo intuitu*, with a view to the purchase of the estate. Here the sum named was beyond the sum which any person could be found to bid for the estate."

But several cases have occurred in the Court of Exchequer, which shew that the duty will attach where no *sale* has in *fact* been made; as in the instance of what is called *a dumb bidding*, that is, where a price is put by the owner under a candlestick, and it is agreed that no bidding shall avail if not equal to that, the duty will attach notwithstanding there is no sale, for such *dumb bidding* is in effect an actual bidding, for the purpose of superseding smaller biddings.[a]

Where a female auctioneer, who never spoke during the whole time of the sale, but immediately after any person bid gave him a glass of brandy, and after the sale broke up he that received the last glass of brandy was, in a private room, declared the purchaser. This was held to be a bidding upon which the auction duty attached.[b]

In those sales which in the north of England are denominated candlestick-biddings, where the several bidders do not know what the others have

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[a] Cruso and another v. Crisp, 5 East. 337. [b] 1 Dow. 111.

offered, a bidding of one per cent. more than any other person has offered is binding on the person making it.[a]

Before the passing of the several acts of parliament relating to sales by auction, an owner could not bid either by himself or his agent.

Therefore, where in an action brought against an auctioneer for selling a horse belonging to the plaintiff for 6*l.* 16*s.* 6*d.*, when the directions given to him were that the horse should not be sold under 15*l.* The conditions of sale were, that the highest bidder should be the purchaser. Lord Mansfield said, "The question is whether a bidding by the owner of goods at a sale under these conditions, namely, 'that the highest bidder shall be the purchaser, and if a dispute arise to be decided by a majority of the persons present,' is a bidding within the meaning of such conditions of sale? There is no express undertaking on the part of the defendant, nor is it, as has been ingeniously said, a direction that there should be no bidding under 15*l.* which might be fair. But the direction given to the defendant is 'not to let the horse *go under* 15*l.*' which implies there might be a bidding under that sum. The question then is, whether the owner can *privately* employ another person to bid for him. The basis of all dealings ought to be good faith; so more especially in these transactions,

[a] Williams *v.* Steward, 3 Mer. 483.

where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder; that could never be the case if the owner might secretly and privately enhance the price by a person employed for that purpose. Yet tricks and practices of this kind daily increase and grow so frequent that good men give into the ways of the bad and dishonest in their own defence: but such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed no one would bid: it is a fraud upon the sale and upon the public. The disallowing it is no hardship upon the owner; for if he is unwilling his goods should go at an under-price, he may order them to be set up at his own price, and not lower. Such a direction would be fair. Or he might do as was done by Lord Ashburnham, who sold a large estate by auction; he had it inserted in the conditions of sale, that he himself might bid once in the course of the sale, and he bid at once 15 or 20,000*l*. Such a condition is fair; because the public are then apprised and know upon what terms they bid." And his Lordship afterwards added, "What is the nature of a sale by auction? It is that the goods shall go to the highest real bidder. But there would be an end of that if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer

and seller. He may fairly bid for a third person who employs him, but not for the owner."[a]

Although the different acts of parliament relating to sales by auction which have been passed since the decision of the last mentioned case sanction the bidding by an owner or his agent, the Courts seem inclined to construe these acts, not as sanctioning the employing of puffers to raise the price but the bidding, either by the owner or his agent, with a view to prevent the estate from being sold at an undervalue; and it has long been an established rule, that where all the bidders at an auction except the buyer are puffers employed by the seller, without public notice having been given that they would bid at such sale on his behalf, and the buyer is thereby induced to give more than the value, such contract will not be enforced either by a court of law or equity.

Thus in the case of Howard *v.* Castle,[b] which was an action brought by the vendor against the purchaser of a leasehold estate. It appeared that the estate was put up to sale by auction on certain conditions, among which were the following:— That the highest bidder should be the purchaser; that the purchaser should at the sale pay 25 per cent. into the hands of the auctioneer, and sign an agreement to pay the remainder before the 31st of March; and that if the purchaser should neglect to

[a] Bexwell *v.* Christie, Cowp. 396. recognised by Grose, J. in Blachford *v.* Preston, 8 Term Rep. 93.

[b] 6 Term Rep. 642; see also Twining *v.* Morrison, 2 Bro. C. C. 362.

comply with the conditions, the deposit money should be forfeited, the plaintiff should be at liberty to resell the premises, and that the purchaser should make good any deficiencies attending the resale with costs. The defendant was declared the purchaser, but refused to pay his deposit or to complete the purchase, it appearing that he was the only real bidder, and that all the other bidders were puffers employed by the plaintiff. The estate was resold, and this action brought to recover the loss and expenses occasioned by such resale.

It was contended on the part of the plaintiff, that whatever might have been the case formerly, the practice of employing puffers at auctions had been sanctioned by the Legislature in three different acts of parliament,[a] passed since the case in Cowper;[b] for those statutes, impose a duty on all goods, &c. sold by auction, except goods, &c. bought in by the purchaser, or by any other person on his behalf: but Lord Kenyon, C. J. said, "In considering the nature of the plaintiff's demand, it becomes necessary to inquire what brought the different persons together at the auction, and on what terms they met when they went there to bid. The plaintiff's estate was advertised to be sold by auction, and one of the conditions of sale was, that the highest bidder should become the purchaser; it was to be presumed also that no fraud

[a] 17 Geo. III. c. 50, s. 10; 19 Geo. III. c. 56, s. 12; & 28 Geo. III. c. 37, s. 20.
[b] Bexwell v. Christie, ante 45.

was to be practised on those who were present to induce them to bid more than they were inclined to offer. At this sale the defendant bid a certain sum, and afterwards refused to complete his purchase. Now, if there was no fraud in this transaction, the plaintiff has a right to call on the defendant, in a court of justice, for a satisfaction for non-performance of the agreement. But it appeared at the trial, that the whole transaction was bottomed in fraud; it was fraud from the beginning to the end; the parties did not meet on equal terms; several other persons bid, who represented themselves as embarking on their own judgment; but it afterwards turned out that this was false, and that this was an imposition practised by the plaintiff upon the defendant, for all those other persons were authorized by the plaintiff to bid for him. I will not go into the general reasoning on the subject, because it is very ably stated by Lord Mansfield in the case alluded to.[a] Only part of that reasoning has now been adverted to by the plaintiff's counsel, but the rest of it is applicable to this case. The whole of that reasoning is founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man. The acts of parliament that have been referred to, did not intend to interfere with this point, but to leave the civil rights of mankind to

[a] Boxwell v. Christie, ubi sup.

be judged of as they were before. In the case cited, Lord Mansfield mentioned an instance in which the owner may legally and fairly bid at the auction, namely, where before the bidding begins he gives public notice of his intention; and in such case no duty is to be paid under the acts of parliament that have been referred to. The circumstance of puffers bidding at auctions has been always complained of; if the first case of this kind had been tried before me, perhaps I should have hesitated a little before I determined it; but Lord Mansfield's comprehensive mind saw it in its true colours, as founded in fraud; he met the question fairly, and made a precedent which I am happy to follow."

And it seems, that where several persons are employed by the vendor to bid for him, without public notice, even if there are real bidders, the purchaser will not be compelled to complete his contract, (though a different opinion appears for merly to have prevailed)[a] as the appointment of more than one person must be merely for the purpose of enhancing the price, and cannot be necessary for the purpose of protecting against the estate being sold at an undervalue.[b]

But there is no doubt that the owner may appoint one person to bid for him, for the purpose of

[a] Conolly *v.* Parsons, 3 Ves. Jr. 625, *n.* Bramley *v.* Alt. 3 Ves. Jr. 620.

[b] Smith *v.* Clarke, 12 Ves. Jr. 483. Blachford *v.* Preston, 8 Term Rep. 93. 95.

guarding against a sale of his property taking place at less than its value, and that a purchaser at such sale, will be bound to complete his purchase, whether notice of the appointment of such bidder was given or not. This is a rule founded in reason and equity, for by it the seller is enabled to protect himself against the tricks, which might otherwise be practised upon him by bidders.

Thus at an auction where one person only bid for the vendor to 75*l.* an acre upon a private notice being given to the auctioneer for the purpose of saving the duty in case the estate was bought in, but without any public notice being given of his appointment, and then after a contest with real bidders the estate was sold at 101*l.* 17*s.* per acre, and the purchaser some days afterwards paid the duty and confirmed the purchase. He was decreed to perform the contract with costs.[a]

So in Smith *v.* Clarke,[b] where the vendors upon the sale of an estate had employed a person *to bid up to but not to exceed* 750*l.* which was the sum for which the estate was sold. It was held that they had not committed any fraud, as the person employed by them, was not employed generally for the purpose of enhancing the price, but for the purpose of guarding against a sale taking place at less than the real value; and they having previous to the sale told him what they considered the real value to be, and beyond which he was not to bid.

[a] Bramley *v.* Alt. H. 1798. 3 Ves. Jr. 620. [b] 12 Ves. Jr. 477.

And if an estate is sold by auction, and there is no contest between real bidders, there being but two bidders, the one employed by the vendor, of which appointment public notice had been given, and the other, the purchaser, such notice will render the purchaser liable to complete his contract.[a]

And it seems that the rule would be the same even where public notice had not been given, provided the bidder was appointed only to protect the vendor's interest, and not for the purpose of raising the price.[b]

It seems doubtful whether the appointment of one puffer would in any case render the sale void. From the case of Smith *v.* Clarke[c] it seems that it would; but from the note of a case in Mr. Sugden's excellent treatise on the law of vendors and purchasers,[d] it appears that the present Vice-chancellor in a late case expressed a contrary opinion; but this opinion of his Honour, it is conceived, cannot be supported consistently with the various other decisions respecting puffers, all of which proceed on the ground, that the employment of persons to bid for the purpose of enhancing the price beyond the real value is a fraud upon real bidders; and if the effecting that purpose by several persons is fraudulent, so also must the effecting of it be by one. But where an estate is advertised to be sold

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[a] Oldfield *v.* Round, 5 Ves. Jr. 508.

[b] Sugden's Law of Ven. & Purch. 6th edit. 23.

[c] 12 Ves. Jr. 483.

[d] 6th edit. p. 24, Fitzgerald *v.* Forster, 31st July, 1813.

*without reserve*, the appointment of one puffer will certainly render the sale void. For the plain meaning of the words "without reserve" is that no person will be employed to bid on behalf of the vendor; and therefore where such words are used, and a person is employed by the vendor for the purpose of keeping up the price, the vendor can have no claim to the aid of a court of equity to enforce a contract against a purchaser, into which he may have been drawn by the vendor's want of faith.[a]

Where a purchaser and his friend are the only bidders, the rest of the company being deterred from bidding by the purchaser's stating to them that he had a claim against, and had been ill used by the late owner of the article, such purchaser will not acquire any right to the property, of which he may by such means be declared the purchaser.

Thus in Fuller *v.* Abrahams,[b] where a barge was put up for sale by auction, and the plaintiff addressed the company present, saying that he had a claim against the late owner, by whom he had been ill used; whereupon no one offered to bid against him. The auctioneer refusing to knock down the barge to the plaintiff's single bidding, a friend of the plaintiff's bade a guinea more, and the plaintiff then made another and higher bidding, amounting however to only one-fourth of the prime cost of the barge. The auctioneer, being indemnified by

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[a] Meadows *v.* Tanner, 5 Mad. 34. [b] 3 Brod. & Bing. 116.

the vendor, refused to deliver the barge to the plaintiff, who commenced an action of trover against the auctioneer, in which the Jury, contrary to the direction of Dallas, C.J. found a verdict for the plaintiff; but the Court of Common Pleas being clearly of opinion that a sale under these circumstances could not be supported, made a rule absolute for setting aside the verdict, and granted a new trial.

### SECT. 5.—*Of the Statute of Frauds.*

BY the 4th section of the statute of frauds,[a] it is enacted that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In the case of Simon *v.* Motivos,[b] Lord Mansfield and Mr. Justice Wilmot seemed inclined to think that sales by auction were not within the statute of frauds, because the solemnity of that kind of sale precluded perjury as to the fact of sale; but it has since been frequently held that

[a] 29 Car. II. c. 3.

[b] 3 Burr. 1921, mentioned in Bull. Ni. Pri. by the name of Simon *v.* Metivier.

sales by auction of lands are within the 4th section of that statute.

In Blagden *v.* Bradbear,[a] which was a bill filed for a specific performance of an agreement for the purchase of a freehold estate belonging to the defendant; which was sold by auction, and knocked down to the plaintiff, who was the highest bidder, at the sum of 805*l.* The defendant by his answer admitted the conditions of sale, but denied that the auctioneer was authorized by him to sign any memorandum or note in writing concerning the estate, or any receipt for money; and stated, that so far from having given such authority, he told the auctioneer, immediately before the sale, that 1000*l.* was the lowest price at which he would suffer the estate to be sold; that the auctioneer took down that sum; and as soon as the estate was knocked down to the plaintiff at 805*l.* the defendant publicly in the sale room objected, and informed the plaintiff of the instructions he had given, and that the auctioneer must have been under some mistake in knocking it down at 805*l.*, and the substance of the defendant's answer was proved. The Master of the Rolls said, "In opposition to the specific performance, prayed by this bill, the statute of frauds is insisted on. The plaintiff endeavours to repel that defence by contending, in the alternative, either that the auctioneer's receipt is a sufficient agreement in writing, or that an agree-

[a] 12 Ves. Jr. 466. See also Buckmaster *v.* Harrop, 7 Ves. Jr. 341.

ment in writing is not necessary; as the provisions of the Statute do not affect sales by auction." And after expressing an opinion that in this case there was not a sufficient agreement in writing, added, "As to the doctrine that the statute of frauds does not apply to sales by auction, there is no decision; for though in Simon v. Motivos[a] the Judges did express their opinion, the ground of their decision was, that the memorandum of the auctioneer answered the requisites of the statute. The words of the statute are large enough to comprehend every contract, by whatsoever preliminary means, whether verbal communication or bidding at an auction, it may have been brought about; and it is not clear to me, that sales by auction are out of the mischief, against which the statute meant to guard. From the public nature of a sale by auction, it does not follow that what passes there must be matter of certainty; so far from it, that I never saw more contradictory swearing than in those cases where attempts were made to introduce evidence of what was said or done during the course of the sale. Though ordinarily the terms and conditions are reduced to certainty, by a written or printed particular, yet, if it is true that the statute does not affect any sales by auction, the whole of the terms might be left to parol evidence, at the hazard of all the uncertainty of perjury, which the statute intended to exclude. I should therefore

[a] Ante 54.

hesitate to say, the policy of the statute does not extend to such sales. Still more should I hesitate to say, the words of the statute, according to the true construction, do not include sales by auction. In the Attorney General *v.* Day,[a] Lord Hardwicke takes occasion to state the grounds upon which sales of a particular description, viz. under a decree of the Court, are necessarily excepted. It seems Lord Hardwicke had no idea, that sales by auction, generally are excepted; for the grounds upon which his Lordship states the exemptions of judicial sales, are not applicable to other sales by auction. I am not warranted therefore to say, that an agreement in writing is not necessary in this case; and I have already said, there is not a sufficient agreement in writing. The consequence is, that this bill must be dismissed."

And in Stansfield *v.* Johnson,[b] which was an action brought for not completing a purchase of copyhold lands which had been put up for sale by auction, Eyre, C. J. said, that the case of Simon *v.* Motivos[c] applied to the sales of goods only, which was a distinct clause of the statute, and that a sale of lands was expressly within the statute.

So in Walker *v.* Constable,[d] which was an action brought to recover the deposit paid upon a contract for the sale of land which had been

[a] 1 Ves. 218.
[b] 1 Esp. Ni. Pri. Rep. 101.
[c] Ante 54.
[d] 2 Esp. Ni. Pri. Rep. 659.

abandoned, and the plaintiff declared upon the special circumstances and stated the contract. It appeared upon the trial, that the premises had been sold by auction; and on the part of the plaintiff, it was contended that it had been settled in Simon *v.* Motivos,[a] that sales by auction were not within the statute; and secondly, that the contract having been abandoned, that it was competent for the plaintiff to shew that it had been to the effect stated in the declaration, and then abandoned, and at an end without producing the instrument itself. Eyre, C. J. said, "The plaintiff cannot proceed without production of the contract; the foundation of the action is the contract for the sale of the premises, which contract, in order to be valid, the statute of frauds requires should be in writing. It is said, that this being a sale by auction is not within the statute; and the case of Simon *v.* Motivos is relied on, but that case does not apply. That was a case on the sale of chattels; it arises under a distinct clause of the statute of frauds. This is a question on the sale of lands, and is not governed by that case; and I am of opinion that such contract is void if there is no note in writing of it produced. The plaintiff's counsel further rely, that being abandoned they may go into parol evidence of it; but its existence and the terms of it must be proved before it can be proved to be abandoned, and upon that it is

[a] Ante 54.

sufficient to say, that being in writing the instrument itself must be produced, and parol evidence of it is inadmissible." In the next term a motion was made to set aside the nonsuit and enter a verdict for the plaintiff, but the Court of Common Pleas held that the nonsuit was right.[a]

An agreement signed by one party only, it has been held, is sufficient to charge *him* within the statute.[b]

Having seen that a sale by auction of lands is within the statute, it now becomes necessary to inquire whether the auctioneer is considered as an agent lawfully authorized, both for the vendor and purchaser, to sign an agreement for the sale and purchase of an estate.

It was formerly held that the auctioneer could not be considered as the agent of the purchaser upon a sale by auction of estates, and could not by setting down in writing the terms of the contract bind him,[c] but these decisions have since been over-ruled; and it is now settled that upon the sale of estates by auction, an auctioneer is the agent of both parties, so as to be able by his signature to bind them both under the statute.[d]

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[a] Walker *v.* Constable, 1 Bos. & Pull. 306.

[b] Seton *v.* Slade, 7 Ves. Jr. 265. Egerton *v.* Matthews, 6 East, 307.

[c] Stansfield *v.* Johnson, 1 Esp. Ni. Pri. Rep. 101. Buckmaster *v.* Harrop, 13 Ves. 456.

[d] Walker *v.* Constable, 2 Esp. Ni. Pri. Rep. 659. 1 Bos. & Pull. 306. Buckmaster *v.* Harrop, 7 Ves. 341. Blagden *v.* Bradbear, 12 Ves. 466. Kemys *v.* Proctor, 3 Ves. & Beames, 57.

And as the first and third sections of the statute, relating to leases, surrenders, &c. require the writing to be signed by the parties making it, or their agent authorized *by writing*, and the words *by writing* are not inserted in the fourth section, it is clear that a parol authority is sufficient. But as the proof of a parol authority may sometimes be attended with difficulty, it is more prudent that such authority should be in writing.

In Emmerson *v.* Heelis,[a] which was an action for not carrying off from the plaintiff's land twenty-seven different lots of turnips, alleged to have been bought by the defendant of the plaintiff, and for not bringing back and laying upon the land a certain quantity of manure; a verdict was found for the plaintiff, subject to the opinion of the Court upon a case in substance, as follows:—The plaintiff put up to sale by public auction, on the 25th of September, 1806, a crop of turnips then growing upon his land in separate lots, and under certain conditions of sale. The defendant by his agent Anthony Moss, his farming servant, attended at the sale, and being the highest bidder for twenty-seven different lots, containing in the whole 108 stiches,[b] or furrows, was declared to be the purchaser thereof; and the name of each purchaser,

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[a] 2 Taunt. 38.

[b] The turnips were raised in the drill husbandry, a single row being sown along the summit of a two-furrow-ridge, with intervals between the ridges for a horse hoe to pass and earth them up: each of these ridges was called a stich.

and amongst others of the defendant, was written in the third column of the sale bill by the auctioneer, opposite to each particular lot, for which the other purchasers and the defendant were respectively declared the highest bidders, in the order in which the same were respectively knocked down. The defendant was not present at the auction; neither did he or Moss sign any agreement in writing, nor did the auctioneer otherwise than as is before stated, by putting down the names of the different purchasers, amongst whom was Moss for the defendant. The following was the form of the bill of sale prepared by the auctioneer, and by which, the turnips were sold. It was divided into five columns:—

"A bill of sale of turnips by stiches, the property of George Emmerson, at Kirkby, in the parish of Bongate, in the county of Westmoreland, that were sold the 25th of September, 1806, by John Wright, auctioneer. Time for payment till the 1st of January, 1807, on giving satisfactory security before they depart the sale, or when demanded. Every four stiches one cart load of manure."

| 1. Number of Stiches. | 2. Number of Lots. | 3. Purchasers' Names. | 4. Articles Sold. | 5. Price. |
|---|---|---|---|---|
| 4. | 1. | Edw. Heelis | Lot 1. | £1. 7s. |

The question for the opinion of the Court was, whether the verdict should stand or a nonsuit be entered. Mansfield, C. J. after noticing two objec-

tions to the plaintiff's right to recover which do not bear upon this part of our subject, said, "The third question is, whether it was an interest in land, and if so, whether a signing by the auctioneer is a signing by an agent for the purchaser; this depends on the fourth section of the statute, for this is an agreement to purchase. The words of the statute are, "that no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, *or any interest in or concerning them*, unless the agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." Now as to this being an interest in land, we do not see how it can be distinguished from the case of hops decided in this Court:[a] and if the auctioneer is an agent for the purchaser, then the statute of frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged." Now this memorandum is more particular than most memorandums of sale are; and upon it the *auctioneer* writes down the purchaser's name. By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid and announce their biddings loudly, and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may

[a] Waddington and others v. Bristow and others, 2 Bos. & Pull. 452.

write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser. And it does seem therefore that this is a contract signed by an agent for the purchaser, and consequently is binding."

And to this decision the Court of Common Pleas have, in another case since decided, adhered.

The case alluded to is White *v.* Proctor,[a] which was an action brought to recover from the defendant the excise duty, which had been paid to government by the plaintiffs, who were solicitors for the vendor of an estate, and which duty was to be paid by the defendant, according to the conditions of his alleged contract for the purchase of an estate by auction, which had been knocked down to him by the auctioneer. Upon the trial of the cause at Guildhall, before Mansfield, C.J. the evidence was, that a sale of lands by auction being advertised, the auctioneer was prepared with a paper in the following form:—

"Sale of Mr. Kemey's estates at the West-gate-house, at the town of Newport, on Wednesday, the 26th day of September, 1810, comprised in six lots."

| Lots. | Price each lot was put up at. | Reserved price, exclusive of timber and coppice wood. | Purchase price. | Duty at 7*d.* in £ 1. | Purchaser's name. |
|---|---|---|---|---|---|
| 1 | Ec. 10. | E. 600. | | | |

[a] 4 Taunt. 209.

The second condition of the sale was, that the highest bidder should sign a contract for the purchase: the sixth was, that the timber and coppice wood should be taken at a price to be fixed before the sale. Another was, that the purchaser should pay the auction duty. At the time of the sale a paper was exhibited to the bidders, in which 3700*l.* was stated as the price of the timber and coppices in the first lot. The defendant was present, but did not bid. Stokes, an attorney, who was the agent of the defendant, bid several times: the defendant and Stokes consulted together; they desired the bidding might be suspended, and went out of the room, and again consulted together. After their return, the lot was knocked down to Stokes, as the highest bidder, for the price of 8600*l.*, and the auctioneer immediately entered, in the fourth column of the above mentioned paper, "8600*l.*" as the purchase price; in the fifth, "253*l.* 15*s.*" as the amount of the excise duty; and in the sixth, "Mr. Stokes," as the name of the purchaser. After the sale was over, Stokes being requested to sign a contract for the purchase, alleged that he had bid the sum of 8600*l.* under a misunderstanding, conceiving that that sum was intended to be inclusive of the price of the timber and coppice wood, whereas it was then alleged to be exclusive of it; and the defendant objected that Stokes had exceeded his authority, if the sum were exclusive of the wood, and expressly directed him

not to sign any contract. There being therefore no other signature by the party to be charged, than the writing of Stokes's name by the auctioneer in the sixth column; it was contended by the defendant, that this was not sufficient to take the case out of the statute of frauds. But Mansfield, C.J. in delivering the opinion of the Court, said, "This is an action brought to recover the auction duty paid by the auctioneer. On looking at the case of Emmerson *v.* Heelis, it is impossible to distinguish this case from that. The question there was, first, whether the thing contracted for was an interest in land; and that being decided, the next question was, whether there was a signature of an authorized agent for the buyer? And it was there held, that entering the name of the buyer in the auctioneer's book, was just the same thing as if the buyer had written his own name. There is no distinguishing the two cases; here the auctioneer writes down the name of the buyer; and therefore that is sufficient."

The vendor in the last mentioned case afterwards filed a bill against Proctor for a specific performance of the contract. The defendant, by his answer, admitted that Stokes was authorized to bid 7000*l.*, but denied his agency beyond that sum; and insisting that there was no memorandum or agreement in writing, claimed the benefit of the statute of frauds. The defendant's answer was not fully supported by evidence. The Master of the

Rolls said, "In point of law this case is the same as that before the Court of Common Pleas; but in point of fact it is not the same: the rules of evidence, by which this Court must regulate its judgment, being different. In the Common Pleas, the question was merely as to the auction duty; but as it is evident the Court could get at that question only through the contract, the contract was directly in question. The Court of Common Pleas had the question twice before it.[a] The decision therefore differs in point of authority from some of the other cases, which are mere Nisi Prius determinations.[b] In Coles *v.* Trecothick,[c] the Lord Chancellor seems to think the distinction between contracts for land and for goods not sound. If the question were open, and I were asked my opinion, whether an auctioneer be the agent of the purchaser as well as of the vendor, I should be disposed to say, that he was not. But after two consecutive judgments of a court of law, I should not give a different judgment from theirs, whatever my private opinion may be." And a specific performance was decreed.[d]

But the auctioneer's receipt for the deposit not containing expressly, or by reference, the terms, viz. the price cannot have the effect of an agreement binding the vendor within the statute.[e]

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[a] White *v.* Proctor, ubi sup. Emmerson *v.* Heelis, 2 Taunt. 38.

[b] Walker *v.* Constable, 2 Esp. Ni. Pri. Rep. 659. Stansfield *v.* Johnson, 1 Esp. Ni. Pri. Rep. 101.

[c] 9 Ves. Jr. 234.

[d] Kemeys *v.* Proctor, 3 Ves. & B. 57.

[e] Blagden *v.* Bradbear, 12 Ves. 466.

A sale before a Master, under the decree of a court of equity, will be enforced, although the purchaser did not subscribe any agreement, for the judgment of the Court in confirming the purchase takes the case out of the statute.[a]

By s. 17 of the statute of frauds, it is enacted, that "no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It was formerly thought that sales by auction were not affected by this clause.

Thus, in the case of Simon *v.* Motivos,[b] we have seen that Lord Mansfield and Mr. Justice Wilmot seemed to think that sales by auction were not within the statute of frauds, because the solemnity of that kind of sale precluded perjury as to the fact of sale; but this opinion no longer prevails.

In the case of Hinde *v.* Whitehouse,[c] Lord Ellenborough, speaking of the opinions given in

[a] Attorney-General *v.* Day, 1 Ves. 218. Blagden *v.* Bradbear, ubi sup.

[b] 3 Burr. 1921.

[c] 7 East. 568.

the case of Simon *v.* Motivos, said, "With all deference to these opinions, I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing, in a statute applying to all sales of goods above the value of 10*l.*, without exception, merely because the quantum of parol evidence in the case of an auction is likely to render the danger of perjury less considerable. That argument, in a degree, applies to all sales in market overt: and if we once get loose from the positive words of the statute, it will become a question only of the quantum and degree of danger of perjury in each particular instance; which opens a door to an indefiniteness of construction, founded on all the varying circumstances of the time, and frequency of persons attending the place of sale, and the like; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world, who are to be governed by it." His Lordship cautiously refrained from giving a decisive opinion upon the question, the case not requiring it.

But in a late case,[a] it was decided that sales of goods by auction, as well as sales of lands, are within the statute. And it has been frequently decided, that an auctioneer is the agent of both vendor and purchaser; and that his writing down the price and the purchaser's name on the particu-

[a] Farebrother *v.* Simmons, 5 Bar. & Ald. 333.

lars and conditions of sale will be sufficient to bind both parties.[a]

Therefore, where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognised the purchase. Lord Ellenborough held, that the initials of the defendant's agent, written by the auctioneer in the catalogue, coupled with the letter recognising the sale, constituted a sufficient memorandum in writing to satisfy the statute of frauds.[b]

But if the particulars and conditions of sale are on more than one piece of paper, and neither externally annexed nor internally referring to each other, the signature of the auctioneer upon one of them will not be binding upon either party.

Thus, where sugars were sold by auction, and the auctioneer at the time of the sale having before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weights of the sugars; and also a written paper, containing the conditions of sale, the latter of which he read to the bidders, as the conditions on which the sugars mentioned in the catalogue were to be sold, but the two papers were neither

[a] Rucker *v.* Cammeyer, 1 Esp. Ni. Pri. Rep. 105. Farebrother *v.* Simmons, ubi sup.

[b] Phillimore and others *v.* Barry and another, 1 Camp. Ni. Pri. Rep. 513.

externally annexed nor contained any internal reference to each other, wrote down on the catalogue the name of the highest bidder, and the sum bid for the particular lots. Lord Ellenborough, in delivering the judgment of the Court, after expressing an opinion that a sale of goods by auction was within the statute of frauds, said, "The first question on the letter of the statute is, Is this a memorandum of the bargain made *by an agent of both parties?* In respect to sales of goods, it has been uniformly so holden ever since the case of Simon *v.* Motivos; and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling, and where the memorandum in the broker's book, and the bought and sold notes transcribed therefrom and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each. All the great transactions of sale in this great city are so conducted, and stand on this foundation of legality only; and it is too late, I conceive, to draw it into question. Supposing the auctioneer or broker for sale to be the agent of both parties, the question then is, has he made a memorandum of the bargain in this case? and it appears to me that he has not. The minute made on the catalogue of sale, which is not annexed to the conditions of sale, nor has any internal reference thereto by context or the like, is a mere

memorandum of the name of a person whom perhaps we may *intend* to be *the purchaser*, and of the quantity and price of the goods, which we may perhaps, on the foot of such memorandum, also *intend* to have been *sold* to the person so named in the catalogue. But in treating it as such memorandum throughout, we must intend also (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale. I am of opinion, therefore, that the mere writing on the catalogue, not being by any evidence incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale."[a]

And the agent, who is to bind a purchaser by his signature, must be a third person, and not the other contracting party on the record; and therefore where the auctioneer signs the contract, as agent for both parties, he cannot himself maintain an action upon it against the purchaser.

Thus, in an action brought by an auctioneer against the defendant for not taking or clearing away, or paying the purchase money, being 34*l.* for a crop of turnips, the only question at the trial was, whether there was a sufficient contract in writing to satisfy the statute of frauds. It appeared that the contract given in evidence was the book in which the plaintiff himself had written down the different biddings opposite to the lots, and which

[a] Hinde *v.* Whitehouse, 7 East, 558.

book had been duly stamped. Wood, B. directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit; and upon a motion for that purpose, Abbott, C. J. said, "The most favourable way for the plaintiff is to treat the question as a case of goods sold and delivered; and then the goods being above the price of 10*l.* the case will fall within the 17th section of the statute of frauds, which requires some note or memorandum in writing of the bargain to be made and signed by the parties to be charged by it or their agents thereunto lawfully authorized. Now the question is whether the writing down the defendant's name by the plaintiff with the authority of the defendant be in law a signing by the defendant's agent. In general an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises in this case from the auctioneer suing as one of the contracting parties. The case of Wright *v.* Dannah[a] seems to me to be in point, and fortifies the conclusion at which I have arrived, viz. that the agent contemplated by the Legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record." And the rule for entering a nonsuit was made absolute.[b]

The 17th section of the statute of frauds does not require any agreement or memorandum in writing to be entered into where there is a delivery

[a] 2 Camp. N. P. Rep. 203. [b] Farebrother *v.* Simmons, 5 B. & A. 333.

by the vendor and an acceptance by the purchaser of part of the goods sold; but in order to satisfy this section of the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner.

10 In one case where sugars which were in the king's warehouse, under the locks of the king and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th of September, when samples of half a pound weight from each hogshead drawn *after* the sugars had been weighed, and the duties ascertained at the king's beam were produced to the bidders assembled, who were informed that the duties were not then paid, but would be paid on the morrow by the seller, and after the biddings closed the samples were delivered to and accepted by the purchaser, according to the usual practice at such sales, *as part of his purchase*, to make up the quantity marked as weighed at the king's beam, and the sugars being consumed by fire on the 22d of September, before the duties could be paid, and without the default of the seller; it was held that the delivery to and acceptance of the samples by the buyer, which delivery was made as part of the thing purchased, and upon which the duties were to be paid, took the case out of the statute, and

another,[a] it was held, that if goods are sold by auction upon condition that they shall be paid for in thirty days, and that if they are not carried away at the end of that time, warehouse rent shall be paid for them, the property in the goods vests absolutely in the purchaser, and they remain at his risk from the moment of the sale.

In Phillips *v.* Bistolli,[b] which was an action of assumpsit for goods sold, to which the defendant had pleaded the general issue; it appeared at the trial that the plaintiff was an auctioneer, and in July, 1822 had put up for sale, among several other articles, a pair of ear-rings, the property of a jeweller, described in the catalogue as brilliant top and drop ear-rings; one of the conditions of sale was, that the purchaser should pay 30 per cent. upon being declared the highest bidder, and the residue of the price before the goods were removed. The defendant was a foreigner and did not fully understand the English language; but he was in the habit of attending the plaintiff's sales and purchasing goods. On the day in question he attended and bought several lots, and the ear-rings in question were knocked down to him as the highest bidder, at the price of 68 guineas. They were immediately delivered to him, and he received them without making any objection. After they had been in his hands three or four minutes; a person

[a] 1 Camp. Ni. Pri. Rep. 513. [b] 2 Barn. & Cress. 511.

who interpreted for him said to the plaintiff, that the defendant had bid for the lot in question under a mistaken idea that the price was 48 guineas. The plaintiff said that the last bidding had been mentioned three times. The defendant then returned the ear-rings. The plaintiff, however, refused to take them back, but said he would keep them on defendant's account. It appeared further, that if they were Assyrian garnets they would be worth about 50*l.* only; but if they were rubies, they would be worth the price at which they were knocked down. And it was doubtful upon the evidence whether they were rubies or garnets. Abbot, C. J. was of opinion, that there was a sufficient acceptance, provided that the defendant was under no mistake when he bid the 88 guineas, and left it to the Jury to find whether the defendant was mistaken in the price at the time when he bid the 88 guineas; and the Jury having found that there was no mistake, a verdict was entered for the plaintiff: but the Court of King's Bench, upon a motion for a new trial, said, "In order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner. It lies upon the plaintiff in this case, to make out that there was such delivery and acceptance. Now here, by the printed conditions of sale, a deposit of 30 per cent. was to

be paid upon the party being declared the highest bidder, and the residue of the purchase-money when the goods were removed; and it is not to be presumed that the vendor intended, contrary to that condition, to part with the right of possession until the deposit or price was paid. There was, therefore, very slight evidence to shew that the plaintiff intended to part with all control over the goods when he delivered them. Then was there any acceptance by the defendant as owner? It appears that a very short interval elapsed after the lot was knocked down, before the defendant objected that he had been mistaken in the price. Unless, therefore, the retaining of them for the three or four minutes that intervened, was evidence of an actual acceptance by him as owner, it is clear that there was not any acceptance afterwards. That, at all events, was very slight evidence of an acceptance by him as owner; and it ought at least, under all the circumstances, to be submitted as a question of fact to the Jury, whether there was a delivery by the vendor and an actual acceptance by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other;" and the Court made the rule for a new trial absolute.

Though payment of part of the purchase money will be sufficient to take a case out of the statute and render a sale valid, notwithstanding there may be no contract in writing, yet payment of the ane-

tion duty is not such a part performance of an agreement as will take it out of the statute.

This was decided in Buckmaster *v.* Harrop,[a] in which it appeared, that on the 23d of July, 1800, certain estates were sold in four lots by distinct particulars, and two agents for Peter Davenport Finney were declared the best bidders at several sums, amounting in the whole to 3119*l.*, and they immediately after the sale declared that they purchased for Finney; and Finney offered to pay the deposits and the auction duty to Strethill Wright, the auctioneer, who was also the vendor, but he declined receiving either, alleging that it was then late at night, and he had to go eight miles; but he told Finney that he would lay down the money, and would settle the same with him some other time, which Finney agreed to; and Wright accordingly paid the auction duty, amounting to 77*l.* 19*s.* 6*d.* Finney soon afterwards gave the amount of the auction duty to his attorneys to be paid to Wright, which was paid accordingly. Finney died before the completion of the purchase, whereupon a bill was filed by his heir at law against his executors, residuary legatees, and Wright, praying a specific performance of the contract, and that the purchase money might be paid out of the personal estate. The Master of the Rolls held that the payment of the auction duty was not a part performance of the agreement sufficient to take the case out of the statute of frauds, and dismissed the bill.

[a] 7 Ves. Jr. 341.

In pleading the statute of frauds, it is necessary to say that the agreement was not reduced into writing.[a]

SECT. 6.—*Of the Stamp Duties.*

BY the 48 Geo. III. c. 149, a stamp duty was imposed upon agreements; but this act was repealed by the *55* Geo. III. c. 184, by which it is enacted, that every agreement or minute, or memorandum of an agreement made in England under hand only, or made in Scotland without any clause of registration, where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties, from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, where the same shall not contain more than 1080 words (being the amount of fifteen common law folios or sheets of seventy-two words each) shall be subject to a stamp duty of 1*l.*; and where the same shall contain more than that number of words to a duty of 1*l.* 15*s.*, and to a further progressive duty of 1*l.* 5*s.* for every entire quantity of 1080 words contained therein, over and above the first 1080 words.

But the latter act exempts from the payment of the above mentioned duties every memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandize.

[a] Mussel *v.* Cooke, T. 1720. Pre. Ch. 553.

And by the 10th section of this statute it is declared, "that from and after the passing of this act, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole, with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law; except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof."

A written instrument which requires a stamp, cannot be admitted in evidence, unless it be duly stamped; and no parol evidence will be received of its contents. If, therefore, the instrument produced is the only legal proof of the transaction, and that cannot be admitted for want of a proper stamp, the transaction cannot be proved at all.*

The following cases, it will be observed, are decisions upon the construction of the 48 Geo. III. c. 149, which was repealed by the 55 Geo. III. c. 184; but as the latter statute contains similar words in the clause imposing duties upon agreements to those contained in the former statute, varying only the amount of the duties to be paid, those cases will of course also apply to the act of the 55 Geo. III.

* 1 Phill. on Evid. 6th edit. 486.

Where a written paper was delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not signed by the auctioneer or any of the parties. Thomson, C. B. held that this was not such a minute of the agreement as was required to be stamped pursuant to statute 48 Geo. III. c. 149, nor such a writing as would exclude parol evidence; and a new trial, which was afterwards moved for, was refused, Lord Ellenborough, C.J. saying, that the paper was perfectly collateral to the taking, and was no more than if the auctioneer had told the defendant on what terms he was to hold, and was not like an original minute.[a]

But in Ramsbottom *v.* Mortley,[b] it was held that a written paper, *signed by the auctioneer only*, and delivered to the bidder to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder and the rent payable must be stamped.

And any writing which would be evidence of part of the contract only must be stamped.[c]

If on a sale of land a single lot is sold for 20*l.* an agreement for the sale and purchase of it requires a stamp; but if the same person is declared the highest bidder for several lots, although all the

[a] Ramsbottom and others *v.* Tunbridge, 2 Maule & Sel. 454.
[b] 2 Maule & Sel. 445. [c] Ib.

lots together amount to more than 20*l.* no stamp is required if the lots separately are of less value than 20*l.* a distinct contract arising upon each lot.[a]

Where the same paper contains two different contracts for the purchase of different lots by different persons, and an action is brought upon one of such contracts, one stamp affixed on that part of the paper which contains the contract of sale with the defendant, and to which the stamp officer's receipt for one penalty refers, will be sufficient to render the agreement admissible in evidence.[b]

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[a] Emmerson *v.* Heelis, 2 Taunt. 38. [b] Powell *v.* Edmunds, 12 East, 6.

## CHAP. II.

### OF THE DUTY AND RESPONSIBILITY OF AUCTIONEER IN REGARD TO VENDOR, AND OF THE MODE OF ENFORCING THE SAME.

#### SECT. 1.—*Of the Auctioneer's Duty in taking care of Goods intrusted to him for the Purpose of Sale.*

THERE does not appear to be any case in which it has been decided to what extent an auctioneer is responsible for the safety and preservation of goods intrusted to his care for the purpose of sale; but there is no doubt that in this respect he stands upon the same footing as a factor, and therefore it may be advisable to state briefly the extent to which the latter is responsible.[a]

A factor is not answerable against all events for the safety of goods which he has in charge; but it is sufficient if he do all that by his industry

[a] In Maltby *v.* Christie, 1 Esp. Ni. Pri. Rep. 340, Lord Kenyon expressed an opinion that an auctioneer was only bound to take such care of goods intrusted to him for the purpose of sale as he would do of his own, but that for a loss arising from misfortune or unavoidable accident he was not liable.

he may for their preservation.[a] The criterion seems to be that he keep them with the same care as a prudent man would his own.[b] He is not liable in cases of robbery, fire, or any other accidental damage which may happen without his default.[c] But though the immediate cause of the loss be one which no care could prevent, as lightning or the like, yet if improper delay in the removal of the property had previously intervened, it is not excused by the nature of the accident.[d]

Though it be in general true, that the trust reposed in an agent is personal and not transferable, yet reasonable convenience, and attention to the benefit of his employer, will often justify him in delegating the custody of goods to another, provided due care is taken to select a proper depositary.

Thus to an action of account for goods delivered to the defendant *ad merchandizandum*, he pleaded that he carried them to *Porto Bello*, and in order to keep them safe, he put them in the warehouse of the South Sea Company, which was broken open and the goods taken away. It was objected, that the defendant had undertaken a special and particular trust, and that having committed the goods to the care of a third person, which he could not lawfully do, he must be answerable for the loss;

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[a] Vere v. Smith, 1 Vent. 121.

[b] Coggs v. Bernard, 2 Lord Raymond, 917.

[c] Anon. 2 Mod. 100.

[d] Caffrey v. Darby, 6 Ves. 496.

but the Court decided in his favour, saying, that a bailiff *ad merchandizandum* is not obliged to keep the goods always about him; and that if the warehouse were not a place of safety that should have been replied.[a]

### SECT. 2.—*Of the Auctioneer's Duty in conducting the Sale.*

AN auctioneer is bound to possess such a degree of skill as is ordinarily possessed by men of that profession or business;[b] and he is bound to use the utmost diligence and care in the execution of his trust. In the absence of specific instructions it is his duty to pursue the accustomed course of that business in which he is employed, and he is responsible to his employer for any damage arising from incompetence, negligence, or breach of orders.[c]

In one case, in which it appeared that the auctioneer at the time of the sale told the vendor that he had taken the proper precautions to prevent the duty attaching in case the estate was not sold; it was held, that the duty having attached in consequence of the proper precautions not having been taken, and the auctioneer having been compelled to pay it, he could not recover it over against the owner,[d]

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[a] Goswell *v.* Dunkley, 1 Str. 681. Bromley *v.* Coxwell, 2 Bos. & Pull. 438. Paley's Princ. & Ag. 2d edit. 17.

[b] Denew *v.* Daverell, 3 Camp. Ni. Pri. Rep. 451.

[c] Shiells *v.* Blackburn, 1 H. Black. 158.

[d] Capp. *v.* Topham, 6 East, 392.

But an auctioneer is not chargeable with a breach of instructions if the compliance with them would have been a fraud upon others.

Thus, in the case of Bexwell *v.* Christie,[a] which has been mentioned before, and which was an action against an auctioneer for disposing of a horse, belonging to the plaintiff, for a less sum than he was directed to sell it for, and in which it appeared, that it was declared by the conditions of sale, that the highest bidder should be the purchaser. The Court held, that as the instructions were fraudulent, the auctioneer was not liable to an action for disobeying them.

If an auctioneer rescinds a contract which he has entered into for the sale of goods, he will be liable to an action, at the suit of his employer; and in such action it will not be necessary for the plaintiff to prove an *express* contract on the part of the auctioneer not to rescind the contract.

Thus, in Nelson and another *v.* Aldridge,[b] it appeared that the plaintiffs had sent to the defendant twenty horses to be sold by auction, which were described in the advertisement of sale, *which was drawn up under the direction of the plaintiffs*, as fresh and active horses in good condition, which had lately been in constant employ on the Essex road. The declaration contained sixteen counts; but the count on which the plaintiff relied, alleged

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[a] Cowp. 395, ante 47. [b] 2 Stark. Ni. Pri. Rep. 435.

that the defendant, being an auctioneer for reasonable hire and reward, &c. undertook to perform his duty as such auctioneer in the sale, &c. of the plaintiff's cattle; and if he sold any of them not to receive the cattle back, nor to rescind the contract. By the conditions of sale, every purchaser was required to pay 5*s.* in the pound when any article was knocked down to him, in part payment, and such article was to be taken away, within one day, at the purchaser's expense. One Gullen became the purchaser of one of these horses, at the sum of 57 guineas, but paid no deposit, and afterwards took away the horse without paying for it; and upon his subsequently making complaint to the defendant, that the horse did not answer the description in the advertisement, the defendant took him back. Best, J. was of opinion, that there was evidence to support this count, and said, that it was the duty of the auctioneer to sell and not to rescind, to do, not to undo; and that the law would imply a contract on his part to discharge his duty; and the plaintiff had a verdict.

If an auctioneer has notice that what he is about to sell is not the property of his principal, but notwithstanding such notice he sells the same, he is personally liable to the true owner for the produce of the sale.

Thus, where the defendant, an auctioneer, had been employed by the assignees of Wigstead, a bankrupt, to sell the bankrupt's interest in a house

which he had occupied before he became a bankrupt, and in which there were several fixtures which belonged to the landlord, and which were inventoried in the original lease from the lessor to Wigstead, as lessee. The defendant advertised the house and fixtures to be sold on account of the assignees, but being shewn the counterpart of the lease and the inventory of the fixtures by the landlord's solicitor, promised that he would not dispose of them, and accordingly sold the house without the fixtures. Hardacre, the plaintiff, became the purchaser; but the defendant afterwards sold the fixtures for 62*l.*, which sum the plaintiff sought to recover, having been called upon by the original landlord. It was objected on the part of the defendant, that he was only an agent employed by the assignees to sell, and that the action should therefore have been brought against the assignees, who were principals; and in support of this objection, Sadler *v.* Evans[a] was cited, in which it was decided, that the title to property could not be tried in an action against the agent; but Lord Ellenborough said, he was of opinion that the action was maintainable against the defendant, though what he had done had been done while acting as an auctioneer: that the law was so in the case stated; but here the auctioneer had made himself, by the manner of conducting himself, *quasi* a principal. He had had notice not to sell. That the

[a] 4 Burr. 1974.

fixtures were the property of the landlord, and of course that they did not belong to his principals; notwithstanding which he sold them and received the value. If a man sells property of others, with full notice that he is doing wrong, and that he is disposing of that to which he has no title, he is liable to an action for money had and received.[a]

An auctioneer may be considered as a special agent for the purpose of sale, and his agency is determined as soon as the sale is completed; he cannot therefore, after the sale, bind his employer by treating of the terms upon which a title is to be made.[b]

Where an authority is given to sell by auction, at not less than a certain sum, and the auctioneer sells by private contract, though without fraud, and for a larger sum than the price fixed, a contract so entered into will not be enforced by a court of equity.[c]

If an auctioneer, without the consent of his employer, permits his clerk to sell, he will be liable to an action, at the suit of such employer, for any loss which may be thereby occasioned; but he will not be liable if his clerk sells with such consent.[d]

Where an auctioneer employs his clerk to sell, such clerk cannot be compelled to account to the owner but to his master only.[e]

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[a] Hardacre *v.* Stewart, 5 Esp. Ni. Pri. Rep. 103.

[b] Seton *v.* Slade, 7 Ves. Jr. 276.

[c] Daniell *v.* Adams, Ambl. 498.

[d] Coles *v.* Trecothick, 9 Ves. Jr. 251. 236.

[e] Cartwright *v.* Hateley, 1 Ves. Jr. 292.

## SECT. 3.—*Of the Duty of the Auctioneer to obtain Payment for Goods sold.*

IT is part of an auctioneer's duty to receive payment for goods which he is employed to sell; and if he delivers such goods to a purchaser without receiving payment for them, he will be liable to an action, at the suit of his employer, for the amount of the purchase money, for which he may, in his own name, maintain an action against the purchaser, notwithstanding such goods were sold on the premises of the owner, and were known to be his property.

Thus, in a case where the plaintiff, who was an auctioneer, had been employed by one Crown to sell his goods by auction, and the sale was at the house of Crown, and the goods were known to be his property; it appeared, that the defendant bought goods to the amount of *7l. 9s. 6d.*, and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff *2l. 4s. 6d.* in cash, and put a receipt into his hand for five guineas, as for a debt due from Crown to the defendant. While the plaintiff was hesitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods. The plaintiff being afterwards called upon by Crown, paid to him (who refused to accept the receipt) the whole sum for which the goods were sold to the

defendant, and brought an action to recover the five guineas, in lieu of which the receipt was offered. The declaration was for goods sold and delivered with the usual money counts, to which the defendant pleaded the general issue. Upon the trial, a verdict was found for the plaintiff. And upon a motion for a new trial, which was refused, Lord Loughborough said, "This case arises upon circumstances which do not often happen, the defendant having practised a trick upon the plaintiff by driving off the goods in a cart, and at the same time holding out the money in sight, together with the paper containing a receipt for the debt due from Crown the owner. Though the defendant shall not be suffered to avail himself of such conduct, yet I entertain no sort of doubt on the general question, being extremely clear, that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody, like a servant or shopman. There is no difference whether the sale be on the premises of the owner, or in a public auction room; for on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest: but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay. In the common course of auctions, there is no de-

livery without actual payment; if it be otherwise, the auctioneer gives credit to the vendee, entirely at his own risk. Though he is like a factor, therefore, in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompense of a commission *del credere*. It is not a true position, that two persons cannot bring separate actions for the same cause: the carrier and the owner of the goods may each bring actions on a *tort*; the factor and owner may each have actions on a contract. I am therefore, upon the whole, decidedly of opinion, that this action may well be maintained."[a]

If the auctioneer dies after he has effected a sale, and after he has received the produce of the sale, if such produce is not kept separate, so that it can be distinguished from his own property, it will be considered as a debt, and the vendor will be postponed to creditors of a higher class; but if the auctioneer dies before the produce of the sale has been received, and it is afterwards received by his representatives, it does not become part of the assets, nor is it liable to specialty debts, but the principal may recover the amount from the representatives, after deducting what may be owing from him to the deceased's estate.[b]

It sometimes happens upon sales by auction

[a] Williams *v.* Millington, 1 H. Black. 81.

[b] Burdett *v.* Willett, 2 Vern. 638. Whitcomb *v.* Jacob, Salk. 160.

version has been proved; the horses were entrusted to the defendant for a qualified purpose, which he has admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; as if a man borrow a horse to ride and leave him at an inn, it has been held to be a conversion."[a]

And if an auctioneer, after he has received notice that his employer, who is a trader, has become a bankrupt by lying in prison two months after his arrest, notwithstanding such notice, sells his goods and pays him the produce before the two months are expired, he will be liable to an action of trover at the suit of the assignees of the bankrupt for the value of the goods, or the assignees may bring an action of assumpsit, in which the auctioneer will be liable for such money as he received.

Thus in King, assignee of Langman, *v.* Leith,[b] which was an action for money had and received to the use of the plaintiff, as assignee. On a motion to set aside a verdict which had been found for the plaintiff, and to enter a nonsuit, it appeared from the report of Gould, J. before whom the cause was tried, that Langman the bankrupt was arrested on the 19th of January at the suit of the plaintiff, and that he became a bankrupt by lying two months in prison, which expired on the 26th of March. On

[a] Powell *v.* Sadler, Sittings after Easter T. 1806. B. R. West. Paley's Princ. and Ag. 2d edit. 74, 75.

[b] 2 Term. Rep. 141.

the 19th of February the plaintiff's attorney gave notice by a letter to the defendant (who had been employed by Langman about the latter end of January to sell his effects) not to sell them, because Langman had committed an act of bankruptcy; that a commission of bankrupt would shortly be issued against him, and that the act of bankruptcy would relate to the day when it was committed, which was some time past. The defendant, by a letter in answer to this, dated the 23d of February, said, that as he had advertised the sale and begun to sell, and the goods would not produce the sum for which Langman was in prison, he had thought it better to complete the sale; and that he had sold the effects without any design to defraud. On the 1st of March the defendant paid Langman 120*l.* being the produce of the sale. The defendant's counsel objected, first, to the form of the action, and that it should have been trover; and, secondly, that the sale and payment were good, being before the act of bankruptcy was complete. But Gould, J. overruled these objections, and gave the defendant leave to move to enter a nonsuit. A rule having been obtained to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered, Ashurst, J. said, "Whatever doubt may have been formerly entertained upon this question, it is now clear that the assignees of the bankrupt have an election to bring either trover or assumpsit in a case like the present. The only distinction

attempted to be taken between this and the other acts of bankruptcy is, that all the other acts of bankruptcy are complete in themselves, whereas this is a complicated matter, and is inchoate till the party has lain in prison two months; and therefore the act of bankruptcy is not complete till the expiration of that time. But I do not think that makes any difference; for as soon as the two months are expired, it relates back to the time of the first arrest, and then operates as if the arrest were a complete act of bankruptcy in itself. Then if the act of bankruptcy over-reaches all intermediate acts, so as to vest the property in the assignees from the time of the act committed, it follows, as a necessary consequence, that they may either affirm or disaffirm the act of any party, who, after the act of bankruptcy, has converted the trader's effects into money, either by bringing an action for money had and received to their use, or by bringing trover; and here they have chosen the former. The statute of *George* the Second makes no difference; that only provides, that no payment shall be set aside which is *bonâ fide* made to the bankrupt in the common course of trade, but this cannot be said to be a payment really and *bonâ fide* made in the common course of trade, because the defendant had express notice of the bankrupt's situation. And though, strictly speaking, at the time of the notice the act of bankruptcy was not complete, yet after that notice the defendant was not warranted in pay-

ing the money over to the bankrupt, and it cannot be called a *bonâ fide* payment." And the rule for entering a nonsuit was discharged.

But where an auctioneer, without having rereceived such notice, sold the goods of his employer and paid him the produce *bonâ fide*, it was held that such payment was protected by the stat. 1 Jac. I. c. 15;[a] and that no action could be maintained against him by the assignees of the bankrupt.

Thus in an action of trover brought by the assignees of a bankrupt against auctioneers for household furniture, plate, and jewellery, it appeared that the bankrupt, who was a silversmith and jeweller, being embarrassed in his circumstances in the end of October 1810, sent the goods mentioned in the declaration to be sold by the defendants, who were auctioneers, at their auction rooms in Coventgarden. A part of them was sold on the 29th of October, and the remainder in the beginning of November. On the 1st of November the bankrupt surrendered himself to prison in discharge of his bail; and having lain there two months, a commission of bankrupt was sued out against him on

[a] This statute is repealed by 6 Geo. IV. cap. 16, by the 84th section of which it is enacted, "That no person, or body corporate, or public company, having in his or their possession or custody any money, goods, wares, merchandizes or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order: provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy."

the 1st of January following. There was no evidence that the defendants ever knew till then that he was in prison, or that he was not carrying on his business as usual. On the 26th of November they settled the balance of his account, and paid the sum of 111*l.* 8*s.* 6*d.* to his agent for his use. Lord Ellenborough said, "The stat. 1 Jac. I. c. 15, contains a favourable provision for persons dealing with traders who have committed a secret act of bankruptcy, and ought to receive a liberal construction in respect to *bonâ fide* transactions. These goods were put into the hands of the defendants before the bankrupt went to prison, and when he had a complete control over them. All the goods were sold before a commission was sued out against him, or he had lain two months in prison. Then the statute provides, that no debtor of the bankrupt be endangered for the payment of his debt, truly and *bonâ fide* before knowing he has become bankrupt. Were the defendants debtors of Wright? They certainly were, as soon as they had sold his goods and received the produce. Did they pay this debt truly and *bonâ fide?* This is not denied. Did they, at the time of such payment, understand or know that he was become bankrupt? No evidence has been adduced to shew that they knew he had gone to prison, and they could not prove a negative. If they had known the fact out of which the bankruptcy sprung, this would have deprived them of the benefit of the statute; but it was in-

cumbent on the plaintiffs to prove notice as in King *v.* Leith;[a] and in the absence of such proof, the present appears to be exactly that sort of payment which the statute was intended to protect."[b]

### SECT. 5.—*Of the Owner's Right to recover Goods from the Assignees of a Bankrupt Auctioneer.*

BY the statute 21 Jac. I. c. 19, s. 11, it is enacted, "That if any person shall become bankrupt, and at such time as he shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in his possession order and disposition any goods or chattels whereof he shall be reputed owner, and take upon himself the sale, alteration, or disposition as owner, that in every such case the commissioners or the greater part of them shall have power to sell and dispose the same to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt."[c]

This statute, as it has been said by Lord Mans-

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[a] Ante 96.

[b] Coles and another, assignees of Wright, a bankrupt, *v.* Robins and others, 3 Camp. N. P. Rep. 183.

[c] This act was repealed by 6 Geo. IV. c. 16, by the 72d section of which it is enacted, "That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission."

field, does not extend to all possible cases where one man has another man's goods in his possession. It does not extend to the case of factors or goldsmiths, who have the possession of other men's goods merely as trustees, or under a bare authority to sell for the use of their principal, but the goods must be such as the party suffers the trader to sell *as his own.*[a]

And in a later case, Lord Kenyon said, that the case of a factor had been so frequently decided and so much taken for granted for a series of years past, that it must now be considered to be at rest. If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt; nay, if the goods be sold and reduced to money, provided that money be in separate bags and distinguishable from the factor's other property, the law is the same;[b] and the reason given by Buller, J. for allowing these exceptions is, that as bankers and factors must, by the course of their trade, have the goods of other people in their possession, a false credit is not thereby held out to the world;[c] and this reason,

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[a] Mace *v.* Cadell, Cowp. 233.

[b] Tooke *v.* Hollingworth, 5 Term Rep. 226. Lingham *v.* Biggs, 1 Bos. & Pull. 82. Bryson *v.* Wylie, ib. *n.*

[c] Bryson *v.* Wylie, 1 Bos. & Pull. 82, *n.* See also Horn *v.* Baker, 9 East, 244.

it is apprehended, applies with equal force to the case of an auctioneer intrusted with the possession of goods for the purpose of sale, where such auctioneer becomes bankrupt before a sale is effected.

If goods remain in specie unsold in the bankrupt's hands at the time of the bankruptcy, which the assignees refuse to deliver to the owner, he may maintain an action of trover for them;[a] but if the assignees have a lien upon the goods for money owing from the principal to the bankrupt, they will be entitled to retain them until such lien is discharged.[b]

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[a] Scott v. Surman, Willes, 404.
[b] Hollingworth v. Tooke, 2 H. Black. 502.

## CHAP. III.

### OF THE RIGHTS OF AUCTIONEER WITH REFERENCE TO VENDOR, AND OF THE MODE OF ENFORCING THE SAME.

#### SECT. 1.—*Of the Auctioneer's Right to purchase Property which he is employed to sell.*

AN agent employed to sell cannot generally become the purchaser himself during the time that his character of agent exists. The reason and justice of this rule are too obvious to require explanation. For with whatever fairness he may deal between himself and his employer, yet he is no longer that which his service requires, and his employer supposes him to be—an agent who has the interest of his employer solely in view.

But, generally speaking, an auctioneer, as soon as the sale is over, ceases to be considered as an agent, and may purchase from his employer that property which he has previously been engaged to sell. But if such auctioneer has also been in other respects connected with the interests of the vendor,

as by having been concerned in valuing the property, and purchases the estate the next day by private contract, where the property was not sold at the auction in consequence of no bidding having been made, and no satisfactory account of the proceedings of the day be given by the auctioneer in his answer to a bill filed against him as purchaser, a court of equity will, under such circumstances, set aside the contract; for in such a case the Court will consider that the duties of an agent so circumstanced were not concluded with the mere business of the day.

Thus, where a bill was filed by a vendor to set aside a contract several years after a conveyance had been executed and the purchase completed, it appeared that the plaintiff was tenant for life, of the premises sold under the contract sought to be set aside, by virtue of his marriage settlement, without impeachment of waste; and that having become involved in debt, and greatly embarrassed in his pecuniary affairs, in May 1801, he conveyed all his estate, right, title, and interest in the settled premises, to trustees, for the purpose of sale, (subject to a rent charge of 150*l.* per annum reserved to himself,) for the benefit of such of his creditors as should execute the deed. Immediately after he had himself executed that deed he left the country, and went to reside in the Isle of Man, for the manifest and avowed purpose of personal protection from his still unsatisfied creditors. The *trustees*

thereupon employed *a land surveyor* for the purpose of *measuring and valuing the plaintiff's interest in the premises*, preparatory to putting them up to sale. The surveyor was assisted in the performance of that duty throughout *by his son, the defendant, the purchaser*, who had, then very recently, been his father's partner in the business, (himself also a land surveyor and auctioneer,) so that he had had great share in making that valuation, by measuring and mapping the estate, &c. The result of that valuation (which was completed in December 1801) was an estimate, stating the annual value to be 232*l.* 3*s.* 5*d.* On the 6th of February following the estate was put to sale by public auction, upon which occasion *the defendant* (the purchaser) was employed *as the auctioneer*. The estate not being then sold, in consequence of there not being any bidders, the defendant on the next day proposed to the trustees to purchase the estate himself for 500*l.* They immediately acceded to the proposal, and let the defendant into possession on the 15th of April, but did not require of him to pay the purchase money till the 5th of March, 1803, when the conveyance to him was executed, and they then received it, *without taking or requiring interest*. That conveyance was soon afterwards executed by the plaintiff, who came from the Isle of Man for that purpose, upon receiving a letter from one of the trustees, informing him that if he did not execute the deed, the annuity of 150*l.* would

be no longer paid. At the time of the sale to the defendant there was a quantity of valuable timber on the estate, said to be worth from 300*l.* to 700*l.* which had not been taken into consideration in making the above estimate of the plaintiff's interest. The purchase was, under these circumstances, sought to be set aside, (amongst other grounds) on the ground that it was made by a *person of skill in business, employed confidentially* on the part of the plaintiff to value and sell the estate for his advantage. Richards, Ch. B. in delivering the judgment of the Court, said, "It was said that there is no legal objection to an auctioneer, although he may have been employed to sell, becoming himself a purchaser afterwards of the very same estate; and that when he has once retired from his duty he becomes an indifferent person, and is then capable of treating with the owner for the purchase on his own account. I do not deny that in general and ordinary cases he may do so; as where a person, in all other respects a stranger, is merely employed for the time as the auctioneer; but I deny that in such a case as this, and under the circumstances disclosed to the Court by this proceeding, he could purchase; because in this case I consider, that the person who acted as auctioneer was so connected with the parties, that his agency must be considered to have continued after he had descended from the rostrum; for where I see so intimate a connection so long subsisting between

parties so situated as these unfortunately were, and find a purchase made of the employer's estate so immediately following an ineffectual attempt to sell, I am bound to say that the party purchased as auctioneer, or at least while his general duty continued. I am clearly of opinion, that an auctioneer, while his employment continues, cannot purchase the estate which he is engaged to sell: and that opinion is founded on the well known and established rule of equity, that persons who are in any way invested with a trust, or an employment to be performed by them to the advantage of their *cestuique trust*, or principal, are *primâ facie* virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty."[a]

## SECT. 2.—*Of the Auctioneer's Lien.*

UPON goods intrusted to an auctioneer for the purpose of sale he has a lien for a balance which accrues due to him during the time the goods are in his possession, for the charges of the sale, the commission, and the auction duty; and if he receives the money for such goods after they are sold he will be entitled to retain it for such balance.[b]

[a] Oliver and wife, and their heir at law, *v.* Court and others, 8 Price, 127.

[b] Drinkwater *v.* Goodwin, Cowp. 251. Hammond *v.* Barclay, 2 East, 227. Houghton *v.* Matthews, 3 Bos. & Pull. 488.

But if an auctioneer sells goods, and delivers them without demanding payment, and without giving notice to the purchaser of any lien or claim which he has on the owner, and the purchaser without such notice settles for the goods with the owner, the auctioneer having parted with his lien cannot maintain an action against the purchaser for the price of the goods.[a]

And where an auctioneer sold goods, and delivered them without asking for payment, and without giving the purchaser any notice of a lien which he had upon the goods, it was held, that as he had parted with his lien the purchaser might, in an action brought against him by the auctioneer for the purchase money, set off a debt due to him from the vendor.[b]

### SECT. 3.—*Of the Auctioneer's Right of Action to recover Commission, Auction Duty, &c.*

THE right to commission may either be the subject of a special agreement or rest upon the *quantum meruit*. But if the auctioneer trusts only to the honour of his employer, he thereby leaves it to the option of the latter, either to remunerate him or not, and cannot insist upon any compensation. Thus, where a person performed work for a committee, under a resolution entered into by

[a] Coppin *v.* Walker, 7 Taunt. 237.
[b] Coppin *v.* Craig, 7 Taunt. 243.

them, "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right;" it was held, that an action would not lie to recover a recompence for such work, the resolution importing that it was to be in the breast of the committee whether he was to have any thing, and if any thing, then how much.[a]

An auctioneer, where there is no agreement between him and the vendor as to the allowance which he is to have for his trouble, is not entitled to more than a fair *quantum meruit* for his labour, notwithstanding any usage in the trade to charge more.[b]

And if an auctioneer, employed to sell an estate, is guilty of negligence, whereby the sale is rendered nugatory, he is not entitled to recover any compensation for his services from the vendor, unless a specific sum was agreed upon.

Thus, in Denew *v.* Daverell,[c] the plaintiff, who was an auctioneer, had been employed by the defendant to sell for him a leasehold house, in Grosvenor-street. The plaintiff advertised the house, and made out a particular of the conditions of sale, which was submitted to the defendant, and which he approved of. The lease of the house was bought, upon this particular, by Lord Bolton,

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[a] Taylor *v.* Brewer, 1 M. & S. 290. [b] Maltby *v.* Christie, 1 Esp. N.P. Rep. 340.

[c] 3 Camp. Ni. Pri. Rep. 451.

who immediately called upon the defendant to shew that Lord Grosvenor, the lessor, had a power to grant the lease. A bill being filed for a specific performance, the Chancellor held, that the vendor, without an express stipulation to the contrary, was bound to shew the title of the lessor, and the defendant was not in a situation to do so. Lord Bolton, accordingly, brought an action against the auctioneer, and recovered back his deposit. The amount of the damages and costs in that action were paid into Court by the defendant in this case. The plaintiff sought to recover further, two and a half per cent. commission upon the sum for which the lease was sold to Lord Bolton. It was proved, on the part of the defendant, by several witnesses, that it had been the constant usage of auctioneers for a number of years, when employed to sell leasehold property, to insert a proviso in the particular, that the vendor should not be called upon to shew the title of the lessor. Lord Ellenborough said, "Where there is a special contract for a stipulated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross action for any negligence he complains of. But, where the plaintiff proceeds, as here, upon a *quantum meruit*, I have no doubt that the just value of his services may be appreciated; and that if they are found to have been wholly abortive, he is entitled to recover no compensation. In the present case, the plaintiff appears to have been

guilty of gross negligence, and the defendant has suffered an injury instead of deriving any benefit from employing him. A practice has very properly sprung up among auctioneers in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called upon to shew the title of the lessor. The plaintiff was bound to take notice of that practice, and to insert such a clause in the particulars of sale of the defendant's house. Had this been done, the defendant would have been secure, and Lord Bolton must have completed the purchase. By the omission, the defendant has the house thrown back upon his hands with expensive litigation. It is no answer, that the particulars were shewn to him, and that he made no objection to them. I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf, which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness he leads me into mischief, he cannot ask for a recompence; although, from a misplaced confidence, I followed his advice, without remonstrance or suspicion."

Where an auctioneer sells an estate, the title to which being objected to, and he refuses to return the deposit, to recover which an action is brought against him, in which he afterwards pays the costs, he cannot recover these costs against the principal

in an action for money paid to his use, but must declare specially. But an auctioneer, under similar circumstances, would, in an action against his principal for money paid, be entitled to recover the auction duty.

Thus, in Spurrier *v.* Elderton,[a] which was an action of assumpsit, for money paid, with the other usual money counts; it appeared, that the plaintiff was an auctioneer, and that the action was brought to recover from the defendant the sum of 75*l.* under the following circumstances. The defendant had employed the plaintiff to sell an estate. The plaintiff accordingly put it up to sale, and it was knocked down to a purchaser; but after it had been so sold, it was objected to by the purchaser, on the ground that there was a defect in the title. The defendant insisted, that it was a good title, and that the buyer should complete his purchase. Upon which an action was brought by the purchaser, who refused to complete his purchase, to recover back the deposit against Spurrier, who was the auctioneer. When the action was commenced against Spurrier he gave notice of it to the defendant; and required him to defend the action, which he declined to do. Upon which the plaintiff paid back the money he had received as a deposit, without further contest; and also the costs of the action, and those of his own attorney, together with the excise duty charged on the sale, and interest on it

[a] 5 Esp. Ni. Pri. Rep. 1.

from the time of the sale, and brought this action to recover the several sums so paid. Lord Ellenborough held, that the money paid on account of the costs in the cause could not be recovered in this form of action, which was for money paid only; and to recover on the general count, it should appear clearly to be money actually and necessarily paid to the party's use. That there should have been a special count, inasmuch as the right to these costs by the plaintiff was not so apparent. The plaintiff might have defended the action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, as they were incurred without his consent. If the plaintiff had declared specially, the defendant would then have had notice of those points; and he would have had the plaintiff's claim on the record, and have been prepared to contest it; which, under the present declaration, he could not be prepared to do. But his Lordship held, that the plaintiff might recover for the money actually paid on the other accounts.

If an auctioneer neglects to take the proper precautions to prevent the duty attaching, in case the estate is bought in by the owner, he will be liable to pay the duty himself, and cannot recover it from his employer.

Thus, where an auctioneer was employed to sell an estate, the lowest price of which was fixed

by the owner, and written down by him on a piece of paper, which was put under a candlestick at the time of the sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by the acts of the 19 Geo. III. c. 56, and 28 Geo. III. c. 37; but being asked at the sale, whether he had taken proper precautions to avoid the duty in case there were no sale, he said, that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price, it was no sale or duty. It was held, that the duty having attached, though there were no sale, for want of taking the precautions required of the owner by the statutes under such circumstances; and the auctioneer having been sued for the duty on his bond to the Crown, and compelled to pay it, he could not recover it over against the owner; and Lord Ellenborough, C.J. said, "Where there is mutual error each must take the particular inconvenience on himself, which results from his own error. But here the defendant, who knew nothing of the manner of conducting a sale, trusted to the plaintiff, whom he supposed competent to his business; and in answer to the question, whether the plaintiff had taken the proper precautions (evidently meaning those which the acts of parliament pointed out) to avoid the duty if there were no

sale? the plaintiff stated what his mode was (which mode was adopted); and he pledged, as it were, his experience, that, pursuing that mode, if there were no sale, there would be no duty attaching. He was mistaken in the law; and now he endeavours to make the defendant suffer for his own mistake."[a]

It has been held, that there is no implied promise on the part of a sheriff to indemnify an auctioneer who sells goods seized under a fi. fa. when employed to do so by the sheriff's officer, to whom the warrant was directed, and the plaintiff's attorney in the original cause, although the sheriff certified to the Excise Office that he himself had seized the goods, and he in fact received the poundage from the produce of the sale. And that if an action of trespass was brought by the owner of the goods against the auctioneer, the sheriff, and others, and all the damages awarded in which were levied upon the auctioneer alone, he could not maintain an action against the sheriff, by whom he had been employed on an implied promise of indemnity.[b]

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[a] Capp v. Topham, 6 East, 392.

[b] Farebrother v. Ansley, 1 Camp. Ni. Pri. Rep. 343.

## CHAP. IV.

### OF THE RIGHTS OF VENDOR AGAINST VENDEE ARISING FROM THE SALE BY AUCTION, AND OF THE MODE OF ENFORCING THE SAME.

#### SECT. 1.—*Of the Vendor's Right to hold the Goods until the Conditions of Sale are complied with.*

THE next subject of inquiry will be as to what rights the vendor has against the vendee, when a contract for the sale of property is completed.

After a contract is entered into for the sale of goods, the vendor has such a lien upon them as entitles him to retain the possession of them until the price is paid, unless it has been agreed upon between the parties that a certain time shall be given for payment.

Thus it is said, "If I sell my horse for money I may keep him until I am paid, but I cannot have an action of debt until he be delivered; yet the *property* of the horse is *by the bargain* in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And if

the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer."[a]

And it is said by Blackstone,[b] that "If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed;" and again, "As soon as the bargain is struck the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods until he tenders the price agreed on."[c]

It was formerly held, that if any part of the price was paid down, if it were but a penny by way of earnest, the property of the goods was absolutely bound by such part payment, and that the vendee might recover the goods by action;[d] but this doctrine has since been over-ruled.

Thus in the case of Hodgson *v.* Loy,[e] the Court of King's Bench was clearly of opinion, that the circumstance of the vendee having partly paid for goods, did not defeat the vendor's right to stop them *in transitu*, the vendee having become a bankrupt.

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[a] Noy's Maxims, 88, recognised by Lord Ellenborough in Hinde *v.* Whitehouse, 7 East, 571.

[b] 2 Black. Com. 447.

[c] 2 Black. Com. 448.

[d] Noy's Max. c. 42. 2 Black. Com. 448.

[e] 7 Term Rep. 440. See also Feise *v.* Wray, 3 East, 102.

So that it may now be considered that a vendor has a right to retain goods until he receives payment, unless the contrary is expressly provided for by the conditions of sale; and that he has such right, notwithstanding the purchaser may have paid part of the price, such part payment not discharging the vendor's lien, but only diminishing it *pro tanto.*

### SECT. 2.—*Of the Vendor's Right to stop Goods* in transitu.

WHEN goods are consigned upon credit by a vendor to a purchaser, it frequently happens that the consignee becomes a bankrupt or insolvent before the goods are delivered. In such case the law, deeming it unreasonable that the goods of one person should be applied in discharge of the debts of another, permits the consignor to resume the possession of his goods, at any time before the consignee obtains possession of them. This right, which the consignor has of resuming the possession of his goods, if the full price has not been paid, is technically termed the right of stopping *in transitu.* The doctrine of stopping *in transitu* owes its origin to courts of equity, but it has since been adopted and established by a variety of decisions in courts of law, and is now regarded as a right which those courts are always disposed to assist.

There is no case reported in which the right of stoppage *in transitu* has been litigated between a

vendor and vendee upon a sale by auction; but as a case of this sort, when it does arise, will be governed by the various decisions which have already been made upon sales by private contract, it will be necessary to state briefly some of the most important of those decisions; to state them all would extend this work far beyond the bounds originally designed.

Where the consignee of goods becomes insolvent, the consignor may stop them *in transitu* before the consignee gains possession;[a] and he may do this whether the whole or only a part of the price remains unpaid.

In the case of Burghall *v.* Howard,[b] Lord Mansfield said, that where the consignee becomes a bankrupt, *and no part of the price has been paid*, it is lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignee.

But as the right of stopping *in transitu* does not proceed on the ground of rescinding the contract, but is an equitable lien adopted by the law for the purposes of substantial justice, the circumstance of the vendee having paid in part for the goods, will not defeat the vendor's right of stopping them *in transitu;* but he has a right to retake them, *unless the full price of the goods has been paid;*

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[a] Mason *v.* Lickbarrow, 1 H. Black. 357. 2 H. Black. 211. 2 Term Rep. 63. 5 Term Rep. 367, 683.

[b] 1 H. Black. 366, *n.*

and the only operation of a partial payment is to diminish the lien *pro tanto*.[a]

As to the time at which the vendor's right of stoppage terminates, it was said by Lord Alvanley,[b] that if in the course of the conveyance of goods from the vendor to the vendee the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them; and although it had been said, that the right of stoppage continued until the goods arrived at their journey's end, yet, that if the vendee met them upon the road and took them into his own possession, the goods would then have arrived at their journey's end, with reference to the right of stoppage.

Goods being received into the possession of an agent of the consignee before they arrive at the abode of the consignee, is sufficient to deprive the seller of his right to stop *in transitu*.[c]

Upon the principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it; it has been held, that if a consignee assign bills of lading to a third person *bonâ fide* and for a valuable consideration, the consignor is thereby deprived of his right of stoppage *in transitu*. This was decided by the Court of

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[a] Hodgson v. Loy, 7 Term Rep. 440. Feise v. Wray, 3 East, 93.

[b] Mills v. Ball, 2 Bos. & Pull. 461.

[c] Wright v. Lawes, 4 Esp. Ni. Pri. Rep. 82.

King's Bench in the case of Lickbarrow and another *v.* Mason and others,[a] and the judgment of that Court was afterwards over-ruled in the Exchequer Chamber, but the case being afterwards brought before the House of Lords, the judgment of the Exchequer Chamber was reversed, and a *venire de novo* awarded. After a second trial the Court of King's Bench declared themselves of the same opinion as before; but as it was understood that the case would again be taken to the House of Lords, the Court gave judgment without argument. The case, however, does not appear to have been carried any further, and the judgment of the Court of King's Bench has ever since been considered as law.

The legal title, however, of the indorsee of a bill of lading may be impeached on the ground of fraud;[b] but the mere knowledge by an indorsee of a bill of lading for a valuable consideration, that the consignor had not received money payment for his goods, but had taken the consignee's acceptances, payable at a future day not then arrived, is not in the absence of fraud sufficient to invalidate the assignee's title to the goods.[c]

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[a] See this case reported in its several stages in 2 Term Rep. 63. 1 H. Black. 357. 2 H. Black. 211. 5 Term Rep. 367. 683; and see also the argument of Mr. Justice Buller in the House of Lords, in 6 East, 20, *n*.

[b] Wright *v.* Campbell, 4 Burr. 2046. Salomons *v.* Nissen, 2 Term. Rep. 674.

[c] Cuming *v.* Brown, 9 East, 506. See also Waring *v.* Cox, 1 Camp. Ni. Pri. Rep. 369. 3 Camp. Ni. Pri. Rep. 92.

If the consignee of goods to whom the bill of lading is indorsed in blank assign it over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards, by an agreement between them, they become partners in the goods, by which agreement it appears that the consignor has not been paid for them; it has been held that the assignee of the consignee cannot maintain trover against the consignor, if he stop the goods *in transitu* upon the insolvency of the consignee.[a]

But if the purchaser of goods to be paid for by bill, after giving his acceptance, during the time of credit, and while the goods are *in transitu*, sells them to a third person for a valuable consideration, but without transferring any bill of lading to him, the original vendor will be deprived of his right of stoppage *in transitu*.[b]

## SECT. 3.—*Of Vendor's Right of Action against a Purchaser.*

WHERE goods are sold by an agent, an action may be brought against the vendee for the price of them, either in the name of such agent, or in the name of the actual vendor.[c]

But an action by a vendor to recover payment for goods sold by an auctioneer may be resisted by

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[a] Salomons *v.* Nissen, 2 Term Rep. 674.
[b] Davis *v.* Reynolds, 4 Camp. N.P. Rep. 267. [c] Snee *v* Prescott, 1 Atk. 248.

a purchaser, on the ground of an act of the auctioneer, which would have had the effect of invalidating the contract if it had proceeded from the vendor himself.[a]

It seems, that where an auctioneer does not disclose the name of his principal, but delivers the goods sold in his own name, the purchaser may set off a debt due from the auctioneer in an action brought against him by the principal for the price of the goods.[b]

In the case of Rabone *v.* Williams,[c] Lord Mansfield said, "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This (his Lordship added) had been long settled." The judgment delivered by his Lordship in this case has since been recognised[d] as law by Lord Kenyon, and, it is apprehended, applies to the case of a vendor and vendee upon a sale by auction.

If an auctioneer becomes bankrupt after he

[a] Paley's Prin. & Ag. 2d ed. 250.
[b] George *v.* Clagget, 7 Term Rep. 359; and 2 Esp. Ni. Pri. Rep. 557.
[c] 7 Term Rep. 360, *n.*
[d] Bayley *v.* Morley, 7 Term Rep. 360, *n.*

has effected a sale, the vendor may maintain an action against the purchaser for the purchase money, if it has not been paid to the auctioneer; or if the vendor gives notice to the purchaser not to pay it to the auctioneer, and the purchaser, notwithstanding such notice, subsequently pays it to the auctioneer, he will be liable to pay it to the principal also.[a]

Although a seller is unquestionably liable to an action of deceit at the suit of a purchaser, if he fraudulently represents the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing; or if he do so, in such a manner as to induce the buyer to forbear making the inquiries which for his own security he would otherwise have made; yet a buyer is not liable to an action for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers.[b]

Though a contrary doctrine formerly prevailed,[c] it is now settled upon the principle, that the purchaser, from the time of the purchase, is in equity owner of the estate; that he must pay the consideration money, notwithstanding the estate itself should be injured or completely destroyed by fire or otherwise, between the time of the contract and

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[a] Scrimshire v. Alderton, 2 Str. 1182. Mann v. Forrester, 4 Camp. Ni. Pri. Rep. 60.

[b] Vernon v. Keys, 12 East, 632.

[c] Stent v. Bailis, 2 P. Wms. 220. White v. Nutt, 1 P. Wms. 62.

the conveyance; and upon the same principle, that he will be entitled to any benefit which may accrue to the estate during the same period.[a]

But where an estate is sold before a master in chancery, and the report has only been confirmed *nisi*, when an accident happens to the estate, the loss, in such case, will fall upon the vendor.[b]

Goods sold remain at the risk of the seller, while any thing is to be done to them, by him, to ascertain the amount of the price.

Therefore, where 289 bales of skins (stated in the contract to contain five dozen in each bale) were sold at *57s. 6d.* a dozen; and it was the duty of the seller to count over the skins, to see how many each bale actually contained; but before any enumeration took place, the whole were consumed by fire. An action having been brought by the vendor against the purchaser for the price, Lord Ellenborough held, that as the enumeration of the skins was necessary to ascertain the price, that was an act for the benefit of the seller; and that as that act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and that the skins continued at the seller's risk; and the plaintiff was nonsuited.[c]

The plaintiff in the above case afterwards

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[a] Paine v. Meller, 6 Ves. Jr. 349. Poole v. Shergold, 2 Bro. C.C. 118. Revell v. Hussey, 2 Ball & Beat. 280. Harford v. Purrier, 1 Madd. 532.

[b] Expte. Minor, 11 Ves. Jr. 559.

[c] Zagury v. Furnell and another, 2 Camp. Ni. Pri. Rep. 240.

brought an action on the same contract in the Court of Common Pleas, and he was in this action also nonsuited.

But when goods are sold, and nothing further remains to be done to them by the seller, the property in such goods will be changed by the sale, and they will be at the risk of the purchaser.

Therefore, where thirteen puncheons of rum were sold by auction, to be paid for in thirty days, and if not carried away at the end of that time, warehouse-rent to be paid for them; the rum having been destroyed by fire after the sale, but before the expiration of the thirty days, an action was brought by the vendor against the purchaser, for the price of the rum. Lord Ellenborough held, that the property vested absolutely in the purchasers from the moment of the sale, the agreement to give stowage room to the goods, free of expense for thirty days, being introduced for their benefit, and being part of the consideration for which the purchase money was to be paid, and that the plaintiff was therefore entitled to recover.[a]

So in the case of Hinde *v.* Whitehouse,[b] where sugars, which were in the king's warehouse, from whence they could not be removed till the duties were paid, were sold by auction on the 20th of September, and at the time of the sale the auctioneer told the bidders that the duties were not

[a] Phillimore *v.* Barry, 1 Camp. Ni. Pri. Rep. 513.
[b] 7 East, 558.

then paid, but would be paid on the morrow by the seller, and a fire having consumed the sugars on the 22d of September, before the duties could be paid, and *without the default of the seller;* it was held, that there was a sale to change the property at the time and place of auction, though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties, and consequently that the vendor was entitled to recover the price in an action against the purchaser.

### SECT. 4.—*Of the Vendor's Right to compel a specific Performance by Bill in Equity.*

As the right of the vendor to compel a specific performance by a bill in equity has necessarily been treated upon at considerable length, while speaking of what is necessary to render a sale binding, in the first chapter, it will not be necessary in this section to do more than to refer to that chapter, and to state briefly a few cases which have not been mentioned there.*

A purchaser will be compelled to complete a contract which he has entered into, notwithstanding there are defects in the estate or thing purchased, of which he was ignorant at the time of the sale, if the defects were patent.

* See Chap. I. and the cases there referred to.

Thus in Oldfield *v.* Round,[a] which was a bill filed to compel a specific performance of an agreement entered into by the defendant to purchase a meadow, which was sold by public auction, and the performance of which agreement was resisted, on the ground that the premises were described as a meadow consisting of fifteen acres, without any notice of a way round and a footpath across it. The Lord Chancellor said, "Certainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser, who does not chuse to inquire. It is not a latent defect."[b]

And a specific performance of an agreement for the sale of an estate will be decreed against a purchaser, notwithstanding there may be a variance from the description, with compensation for the deficiency in value, though a minute examination might have discovered the defects; as in the state of a house and the cultivation of lands; but no compensation will be allowed for a variance from the description, as lying within a ring fence, that being an object of sense.

Thus in Dyer *v.* Hargrave,[c] which was a bill filed to compel the defendant to complete his contract for the purchase of a farm, which was sold by auction on the 23d of February, 1802. The particular described the house as being in good repair,

[a] 5 Ves. Jr. 508.
[b] Lowndes *v.* Lane, 2 Cox, 363; Legge *v.* Croker, 1 Ball & Beatty, 506.
[c] 10 Ves. Jr. 505.

and the farm, as consisting of 150 acres, part arable and part marsh land, in a high state of cultivation; all within a ring fence. The objections taken by the answer were, that the house was not in good repair; that the lands, instead of answering the description of a high state of cultivation, were in a very impoverished state, from neglecting to manure and drain, and that the farm was not in a ring fence, but was intersected by other lands. The Master of the Rolls during the argument said, it was held at law, that a warranty is not binding where the defect is obvious; and put the cases of a horse with a visible defect; a house without a roof or windows, warranted as in perfect repair; and afterwards pronounced the following judgment: "It is impossible to refuse a performance of this contract. It is much too late to contend, that every variance from the description will enable a man to resist the performance. The principle is, that if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value. Whether the Court has not in many cases gone beyond the spirit of that rule, is another consideration. Whether the Court ought to compel a defendant to take compensation for that, which can hardly be estimated by pecuniary value, may admit of doubt. In this case there can be no doubt, except as to the objection that the premises are not in a ring fence, whether the whole is not the subject of pecuniary compensation. As to the re-

pairs, unless it could be shewn that the defendant wanted possession of the house to live in at a given period, it is mere matter of pecuniary estimation. The same observation applies to the situation of the marsh land: the defendant loses nothing but money by finding that in a worse state of cultivation than it was represented. That admits a certain estimation. It is not quite so certain, that a precise pecuniary value could be set upon the difference between a farm, compact, in a ring fence, and one scattered and dispersed with other lands. But in this instance the purchaser is clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he purchased. He was willing to purchase it by private contract. He had lived in the neighbourhood all his life. This variance is the object of sense. He must have known whether the farm did lie in a ring fence or not. It is sworn by one witness, that it was distinctly pointed out to him, that there were fields, belonging to other persons, lying intermixed. But independent of that, he could not conceive himself purchasing any thing in a ring fence; for the evidence of his own witnesses shews, that there are thirty or forty acres of others intermixed, above his 150 acres; and he does not pretend that he thought the farm larger than it turns out to be. He had repeated opportunities of going over the farm. If he acquiesces in the situation of what he purchased, and goes on with the treaty,

he cannot afterwards rescind the contract. Whether compensation is to be made is a different consideration. Upon the same ground, that the defendant cannot get rid of the contract on account of the difference in the description of the farm, he cannot be entitled to compensation; for it was an object of sense. He could not be deceived. He could not have an imperfect knowledge; for, if he had any knowledge that any thing was mixed with the subject of his purchase, that puts an end to the description; and if I give him compensation, having that knowledge, he gets a double allowance; for, if he has knowledge, that what he proposes to purchase does not answer the description, it must be taken that he bids so much the less. The two other objections admit a different consideration, for they are such as a man may have an indistinct knowledge of; and he may have some apprehension, that in those respects the premises do not completely correspond with the description; and yet the description may not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it is very uncertain, whether by any view it was possible for him to judge of that. It is stated by many witnesses, that the season of the year was just at the breaking up of a frost; and represented that no man could at that time say whether the land was well or ill cultivated. So he may have seen some trifling defects in the house; and might not intend to make the

objection, if they turned out to be nothing more than they appeared upon the surface, He might consider them too trivial, and not mean to claim compensation for an object so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered that the house was materially defective, very much out of repair. Admitting that he might by minute examination make that discovery, he was not driven to that examination, the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case, where by minute examination the discovery could be made. The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe. This purchaser, therefore, is entitled to compensation for the defects of the house and the cultivation of the marsh land, but not for the other subject of objection."

A purchaser can have no relief against a vendor on the ground, that the vendor at the time of the sale asserted that the estate sold was more valuable than it actually was; nor is he even entitled to relief, where it appears that the vendor falsely affirmed that a person had offered him a particular sum for the estate, although the purchaser was thereby induced to buy the estate, and was deceived in the value.[a]

And courts of equity will decree performance

[a] 1 Rol. Ab. 101, pl. 16.

against a purchaser at an auction, where the particulars of sale complained of as calculated to mislead were so vague and indefinite as to make it the duty of the purchaser to make previous inquiry, and will not allow him any compensation.[b]

Thus, where a church lease was described in the particulars of sale as being of nearly equal value with a freehold, and renewable every ten years upon payment *of a small fine*, the purchaser was not allowed any abatement in his purchase money, although the fine was very considerable; and it appeared that the steward of the estate had remonstrated with the vendor before the sale upon his false description.[a]

And a specific performance will be decreed against a purchaser, notwithstanding there may be a very material error or misstatement in the particulars or conditions of sale, if the purchaser, after the sale, and after he becomes acquainted with such error or misstatement, takes steps for carrying the contract into execution, but he will be allowed a compensation.

Thus where an advertisement for the sale of an estate by auction described it all as freehold, though a small part was held at will. After the purchase, a treaty for an exchange of that part took place, pending which, at the time appointed for completing the purchase, the purchaser took

[a] Trower *v.* Newcome, 3 Mer. 704. Stewart *v.* Alliston, 1 Mer. 6.
[b] Fenton *v.* Brown, 14 Ves. Jr. 144.

possession forcibly, but proceeded in the treaty afterwards till he finally refused to agree to the purchase. On a bill filed by the vendor, the purchase money was decreed to be paid with four per cent. interest from the time it ought; but an inquiry was directed as to what ought to have been the compensation at that time for the part not freehold; and it was ordered, that that with the outgoings should be deducted.[a]

And where property has been sold by auction, and after the sale, and before a conveyance is executed, is destroyed by fire or otherwise deteriorated in value, the purchaser will notwithstanding be decreed to perform his contract.

In Paine *v.* Meller,[b] which was a bill filed for a specific performance of an agreement entered into by the defendant for the purchase of certain houses, which was resisted on (amongst other grounds) the ground that the houses had subsequent to the sale been destroyed by fire. The Lord Chancellor said, "As to the mere effect of the accident itself no solid objection can be founded upon that simply, for if the party by the contract has become in equity the owner of the premises they are his to all intents and purposes. They are vendible as his; chargeable as his; capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heirs."[c]

[a] Calcraft *v.* Roebuck, 1 Ves. Jr. 221.

[b] 6 Ves. Jr. 349.

[c] See also Poole *v.* Shergold, 2

A specific performance will not be decreed, even with compensation, where there has been a *great intentional misrepresentation*, although it may be provided by the conditions of sale, that in case of "any error or misstatement" a compensation shall be made.[a]

Nor will a performance be decreed against a purchaser, where it appears that at the time of the sale the vendor affirmed that the estate had been valued by persons of judgment at a greater sum than it actually was, if the purchaser was influenced by such misrepresentation.[b]

A court of equity will not generally entertain a bill for a specific performance of contracts for chattels, or which relate to merchandize, but leave it to the courts of law where the remedy is more expeditious; but where the agreement is not final, but to be made complete by subsequent acts, a bill to carry it into execution will sometimes be allowed.[c]

### SECT. 5.—*Of the Vendor's Right to recover Goods wrongfully sold or disposed of by Auctioneer.*

WHERE property is intrusted to an auctioneer for the purpose of sale, a transfer by him agreeable to that purpose, and according to the usual course

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Bro. C.C. 118. Revell *v.* Hussey, 2 Ball & Beatt. 280. Harford *v.* Purnicr, 1 Madd. 532.

[a] Stewart *v.* Alliston, 1 Mer. 26.
[b] Buxton *v.* Lister, 3 Atk. 385.
[c] Ibid.

of trade, or his express commission, will convey a complete title to the holder. But a delivery for a different purpose, or in a manner not according to the usual course of trade, or made in a manner not authorized by his commission, will not pass any property in the thing delivered, which may therefore be reclaimed by the owner.

Therefore if an auctioneer, under a general authority to sell, disposes of property upon credit, where the usage of the trade is to sell for ready money only, no contract is thereby created between the owner and the vendee, and the owner may recover the value of the property so disposed of in an action of trover.[a]

If an auctioneer to whom goods are intrusted for the purpose of sale pawn them, the owner may recover the value of them in an action of trover against the pawnee.[b]

And in an action of trover, brought by the owner of goods against a pawnee under such circumstances, the pawnee cannot take advantage of any right which the agent had, as between himself and such owner, to retain them. For as this right is personal it cannot be transferred to a third person by any tortious act; and therefore it is not necessary, in order to maintain the action, that the owner should tender to the pawnee the amount which was due to the agent.[c]

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[a] 12 Mod. 514. [b] Hartop v. Hoare, 3 Atk. 44.
[c] M'Combie v. Davies, 7 East, 5.

But it seems that such action cannot be maintained, where one who has a lien upon goods delivers them to a third person, as a security, with notice of his lien, and appoints him to retain the possession as his servant, for the purpose of preserving such lien.[a]

In an action of trover, brought to recover goods unwarrantably pledged, it is not necessary to prove a demand and refusal, as the taking of another's property, by the delivery of one who has no authority to deliver it, is in itself tortious.

Thus, in the case of M'Combie *v.* Davies,[b] Lord Ellenborough said, "Certainly, a man is guilty of a conversion who takes any property by way of assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect."

SECT. 6.—*Of the Vendor's Right, on non-fulfilment of Contract by Vendee, to retain the Deposit, and to recover Damages from the Vendee for loss on Resale.*

WE have seen that a clause is usually inserted in the conditions of sale, providing, that if the purchase money is not paid within the time limited, the deposit money shall be forfeited, the property

[a] M'Combie v. Davies, 7 East, 5. [b] 6 East, 540.

resold, and any loss occasioned by such resale made good by the purchaser.[a]

If this condition were omitted, there is no doubt that the vendor would be entitled to retain the deposit if the contract was not carried into execution, and the default rested entirely with the purchaser; and that the vendor would also be entitled, in an action against the purchaser, to recover any damage which he might sustain by such default beyond the sum deposited.

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[a] Ante 39.

## CHAP. V.

### OF THE RIGHTS OF VENDEE AGAINST VENDOR, ARISING FROM THE SALE BY AUCTION, AND OF THE MODE OF ENFORCING THE SAME.

SECT. 1.—*Of Vendee's Right, on non-performance of Conditions of Sale by Vendor, to rescind the Contract, and recover back the Deposit with Interest.*

WHERE a deposit is paid on a purchase, and the vendor fails to comply with the conditions of sale, the purchaser may either affirm the agreement by bringing an action for the non-performance of it, or he may disaffirm the agreement *ab initio*, and maintain an action against the vendor for money had and received to his use.[a]

Where an agreement for the sale of defendant's interest in a public-house recited, that the defendant was possessed of an interest in the house, of which eight years and a half were unexpired, and it appeared that the plaintiff, on executing the agreement had paid to the defendant a deposit of

[a] Moses v. Macferlan, 2 Burr. 1011.

*5l.* to recover which, the plaintiff brought an action of assumpsit, for money had and received, on the ground that only six years of the defendant's interest in the house was unexpired. Lord Kenyon said, "I have often ruled, that where a person sells an interest, and it appears that the interest which he pretended to sell, was not a true one; as for example, if it was for a lesser number of years than he had contracted to sell, the buyer may consider the contract as at an end, and bring an action, for money had and received, to recover back any sum of money he may have paid in part performance of the agreement for the sale: and though it is said here, that upon the mistake being discovered, in the number of years of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case. It is sufficient for the plaintiff to say, That is not the interest which I agreed to purchase." [a]

And where leasehold premises are sold by auction, and the lease, containing the usual covenants to repair, is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down is not described in the particulars of sale.

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[a] Farrer v. Nightingale, 2 Esp. Ni. Pri. Rep. 639.

Thus in Granger *v.* Worms,[a] which was an action brought to recover back a deposit paid by the plaintiff to the defendant on the purchase of the lease of a house and premises at Wapping. It appeared, that amongst the subjects demised was a summer-house. This summer-house existed at the time the lease was granted, but had been pulled down before the sale to the plaintiff. The particulars of sale did not describe the summer-house; but the lease was produced and read at the auction, and contained a covenant to deliver up the demised premises in good repair at the end of the term. It was proved that it would cost about 25*l.* to rebuild the summer-house. The plaintiff had agreed to pay 80*l.* for the lease, and the rent of the premises was 20*l.* a year. Lord Ellenborough held, that the plaintiff had a right to expect to find the summer-house described and demised by the lease; and that as it no longer existed, the consideration had failed on which he paid the deposit, and that he had a right to recover it back.

So in Jones *v.* Edney,[b] which was an action for money had and received to recover back the sum of 105*l.*, paid as a deposit upon the purchase of the lease of a public-house, called the General Abercrombie, which in the conditions of sale was described as a "free public-house," that is to say, that the tenant was not bound by the terms of the lease to take his beer from any particular brewer. The lease in fact contained a proviso, that the lessee

[a] 4 Camp. Ni. Pri. Rep. 85. [b] 3 Camp. 285.

and his assignees should take all their beer from the brewery of Elliott and Co., or pay a very high advanced rent. At the sale the auctioneer read over the whole of the lease in the hearing of the bidders. When he came to the clause about taking the beer, he was asked, how the house could be called "a free public-house?" He answered, "That clause has been done away with. There has been a trial upon it before Lord Ellenborough, who has decided it to be bad. I warrant it as a free public-house, and sell it as such." The plaintiff was the highest bidder, and paid 100 guineas deposit; but finding that the clause might still be enforced, he refused to complete the purchase, and insisted on being paid back the deposit. Upon the trial, Lord Ellenborough said, " In the conditions of sale this is stated to be " a free public-house." Had the auctioneer afterwards verbally contradicted this, I should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into, if the written conditions of sale are to be controlled by the babble of the auction room. But here the auctioneer at the time of the sale declared, that he warranted and sold this as a free public-house. Under these circumstances a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation."

Where a person becomes the purchaser at an auction of several lots, it will be considered as an entire contract; that is, that the several lots are purchased with the view of making them a oint

concern; and if the vendor fails in making a title to any one of the lots, the purchaser may refuse to take the others; and by an action of *indebitatus assumpsit* for money had and received, recover the whole sum paid as a deposit.

Thus in Chambers *v.* Griffiths and others,[a] which was an action of assumpsit for money had and received, brought to recover back a deposit made by the plaintiff on a sale by auction, of several houses of the defendants. And the case in evidence was, that the houses in question had, with several others, been put up by public auction in distinct lots; the plaintiff had bid for three of these lots, which had been knocked down to him; and he had paid the deposit for them required by the conditions of sale. One of the conditions was, that the purchaser was to have a good title made to him, within a month after the sale. Within the month, the defendants sent an abstract of the title, but it was to one of the houses only. The plaintiff insisted upon having a title made to him for the other two houses, or of rescinding the agreement for the whole purchase. The defendants were willing to suffer the plaintiff to abandon his purchase of the two houses to which they had not sent an abstract, but insisted on holding him to his agreement for the house to which they had shewn

[a] 1 Esp. Ni. Pri. Rep. 150. Boyce *v.* Blackwell, 3 Anstr. 657. But a different doctrine seems to prevail in courts of equity. Poole *v.* Shergold, 2 Bro. C.C. 118. 1 Cox, 273. Drewe *v.* Hanson, 6 Ves. Jr. 675. Sugd. Ven. & Pur. 6th edit. 255.

a good title. The plaintiff refused these terms, and brought his action to recover back the whole of the deposit money. The defendants had paid into Court the amount of the deposits paid to them for the two houses. The question therefore was, whether the plaintiff had a right to consider the contract as at an end, and to recover his deposit for the house to which the defendants had made a title, they having failed in making any title to the others. Lord Kenyon, C. J. said, "When a party purchases several lots of this description, at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller, therefore, shall not, in case of any defect of his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which the seller could not make a title might be so circumstanced that, without it, the other parts would be of little, or perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased:" and his Lordship added, that a case, under circumstances precisely similar to this, had been decided before him, when he was Master of the Rolls; that, on that case coming before him,

he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was then delivering, but that he at the Rolls had overruled Sir Thomas Sewell's determination, with the general approbation of the bar. That in the present case, therefore, as the defendants had failed in making any title to the two lots in question, the plaintiff had by law a right to rescind the agreement as to the whole, and of course to recover his deposit.

In an action, for money had and received, to recover back a deposit on a sale, on the ground of a defect in the title, the party bringing the action must prove the title bad; and it will not be sufficient to shew that the title has been deemed insufficient by conveyancers, who have been employed to advise upon it.

Thus in Camfield *v.* Gilbert,[a] which was an action brought to recover the deposit which had been paid by the plaintiff to the defendant, on the purchase of an estate contracted to be sold by the defendant to the plaintiff, it appeared, that opinions of different conveyancers had been taken on the title, before the completing of the purchase, who were of opinion, that the title was defective, and ought not to be taken by the plaintiff: and Lord Ellenborough was asked by the plaintiff's counsel, whether it would not be sufficient for him to rely on the fact of such conveyancers advising the party

[a] 4 Esp. Ni. Pri. Rep. 221.

not to complete the purchase? or whether it was necessary for him, on the part of the plaintiff, to go into the title to shew that it was defective, in order to entitle him to recover the deposit as paid on a bad and defective title. Lord Ellenborough said, the plaintiff's right to recover the money deposited, depended on the defect of the title of the defendant to the premises which he had contracted to sell, and unless it was a bad title he had no claim to recover; and that it would therefore be necessary for him to shew that the title was bad.

If there is a latent defect in an article offered for sale, which it is impossible for a purchaser to discover, however careful he may be, he may set aside the contract and recover his deposit, if at the time of the sale the vendor was conscious of the defect, and used any artifice to conceal it, although the property was sold *with all faults*.

It was once held at Nisi Prius by Lord Kenyon, in a case where a ship had been sold *with all faults*, that a vendor was bound to disclose all latent defects, of which he had any knowledge to the buyer; and his Lordship said, that the terms to which the purchaser acceded, of taking the ship with all faults and without warranty, must be understood to relate only to those faults which the purchaser could have discovered or which the vendor was unacquainted with.[a]

But this doctrine has in a later case been over-

[a] Mellish *v.* Motteux, Peake's N. P. C. 115.

ruled by Lord Ellenborough, who held, that the vendor was not liable, unless he used some artifice to conceal the defects.

In the case alluded to, which was an action brought by the purchaser of a ship against the vendor, for a breach of warranty, it appeared that, in the particulars of sale, the ship was described as being in excellent condition, but was sold with all faults. The counsel for the plaintiff offered to prove, that at the time of the sale the ship had several defects in her, which were known to the defendant, and which he did not disclose to the plaintiff, which he contended that the defendant was bound to do, although the ship was to be taken with all faults; and he relied upon the case just mentioned of Mellish *v.* Motteux. Lord Ellenborough said, "I cannot subscribe to the doctrine of that case, although I feel the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold *with all faults*, I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation, is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant

to dispose of him; and instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market, when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust, if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud, unless the seller by positive means renders it impossible for the purchaser to detect latent faults." [a]

And this decision of Lord Ellenborough's has since been recognised by the Court of Common Pleas, when Heath, J. said, "The meaning of selling 'with all faults' is, that the purchaser shall make use of his eyes and understanding to discover what faults there are: I admit the vendor is not to make use of any fraud or practice to conceal faults;" and his Lordship added, "With respect to the doctrine, I adhere to that of Lord Ellenborough, in Baglehole *v.* Walters, without any difficulty." [b]

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[a] Baglehole *v.* Walters, 3 Camp. Ni. Pri. Rep. 154. See also Schneider *v.* Heath, ib. 506.

[b] Pickering *v.* Dowson, 4 Taunt. 779.

And in Schneider and another *v.* Heath,[a] which was an action brought to recover back the deposit paid upon the purchase of a ship, called the Juno, on the ground of misrepresentation and fraud on the part of the vendor. The circumstances of the case were as follow: The sale took place at Lloyd's Coffee-house, on the 23d July, 1813, where a particular was exhibited by the defendant, describing the ship in the following terms: "British built at Monkwearmouth, in 1810, for private use; 129 tons per register; is a clever, burthensome, useful vessel for general purposes; unusually well found in stores, among which are a new cable and hawser never wetted, and a large proportion of entirely new sails: *the hull is also nearly as good as when launched;* requiring a most trifling outfit; now lying off No. 3 warehouse, London Docks; hull, masts, yards, standing and running rigging, *with all faults as they now lie.*" After this description of the ship followed an inventory of the anchors, cables, sails, and ship's stores, provisions, and boats, and at the end of this inventory was the following declaration: "The vessel and her stores *to be taken with all faults*, as they now lie, without any allowance for weight, length, quality, or any defect whatever." The vessel was purchased by the plaintiff for 1580*l.* and he immediately paid the deposit of 397*l.* 2*s.* and having taken possession of her, he sent her to a shipwright's to be examined. Here it was found that her bottom was worm-eaten,

[a] 3 Camp. Ni. Pri. Rep. 506.

that her keel was broken, that she was quite unseaworthy, and that she by no means corresponded with the description in the particular. The plaintiff thereupon refused to complete the purchase, and demanded back his deposit. Upon the trial, it appeared that the ship belonged to a club of underwriters, to whom she had been abandoned, and on whose account she was sold: that the state of her bottom and her keel must have been known to the agents employed to conduct the sale; and that the captain, when the ship was advertised for sale, took her from the ways on which she lay, and where the state of her bottom and her keel might easily have been discovered, and kept her constantly afloat, so that these defects were completely concealed by the water. The person who had framed the particular stated, that he had inserted the description of the vessel without having examined her. It was contended for the defendant, that the action could not be maintained, as the ship and her stores, according to the particular, were *to be taken with all faults;* but Mansfield, C. J. said, "The words are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud either in a false representation, or in using means to conceal some defect. I think the particular is evidence here by way of representation; that states the hull to be

nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent tells us, he framed this particular without knowing any thing of the matter. But it signifies nothing, whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false. But besides this, it appears here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who is to be considered the agent of the owners; and he, evidently to prevent their being discovered by persons disposed to bid for her, removed her from the ways, where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, I am of opinion, that the plaintiff is entitled to recover back his deposit." And the Jury gave their verdict accordingly.

But the ground and basis of an action in a case of this nature, for the recovery of a deposit, where the contract is *in fieri*, or of damages, where the contract is actually executed is the *scienter*; and therefore, if the vendor was not aware of the

defect, he will not be answerable for it. Nor will trifling defects form a sufficient foundation for such an action.*

In an action for money had and received, at the suit of a purchaser against a vendor, to recover back the deposit, the conditions of sale not being complied with, the defendant may, by a Judge's order, obtain a particular of the grounds on which the plaintiff seeks to recover back the deposit; to which the plaintiff will be confined at the trial. But if no such particular is obtained, the plaintiff may entitle himself to a verdict, by proving an infraction of the conditions of sale never before mentioned to the defendant.

Thus in an action for money had and received, to recover a deposit of 40*l.*, paid by the plaintiff to the defendant upon the purchase of certain leasehold premises at Clerkenwell; the plaintiff contended, that the conditions of sale had not been complied with on the part of the vendors, as they could not make a good title to a part of the premises, and in several other respects. It appeared, that the first objection was the only one before pointed out, and on which the plaintiff had refused to complete the purchase. On the part of the defendant it was urged, that this was the only objection on which the plaintiff could now insist. The defendant had never heard of any other, and could not possibly come prepared to meet others

* Sugden's Law of Ven. & Pur. 6th ed. 280. Bowles v. Atkinson, ib.

now started for the first time. If these had been before pointed out, perhaps some of them might have been considered valid, whereupon the deposit would have been returned. But to suffer a purchaser at an auction to break off the bargain on one pretext, and then at the trial to bring forward fresh grounds for his breach of contract, would only be to entrap those who wished to deal honestly, and to encourage fraud and litigation. But Sir James Mansfield, C.J. said, the defendant might have had a particular of the grounds on which the plaintiff sought to recover back the deposit. He certainly, on being applied to in a case like this, would have made an order for such a particular, and would have confined the plaintiff to the grounds stated in it at the trial. But as things actually stood, he conceived the plaintiff would entitle himself to a return of the deposit, on proving any of the conditions of sale to have been broken on the part of the defendants, unless they could shew a waiver on his part. The plaintiff was at liberty to shew that the contract was rescinded, in which case the deposit became money had and received to his use.[a]

So in Collett *v.* Thompson,[b] which was an action of assumpsit for non-performance of a contract for the sale of a house, the plaintiff having in his first count alleged that the defendant, who was to

[a] Squire *v.* Tod and others, 1 Camp. Ni. Pri. Rep. 293.
[b] 3 Bos. & Pull. 246.

make a good title, had delivered an abstract, which was "insufficient, defective, and objectionable;" the Court of Common Pleas obliged the plaintiff to give a particular of all objections to the abstract on which he meant to rely, arising from matters of fact, but said he was not bound to state in his particular any objections in point of law.

A court of equity will not grant an injunction to stay proceedings, in an action brought by a purchaser to recover the amount of his deposit, where the description in the printed particular of sale is calculated grossly to deceive a vendee as to the real nature and value of the estate sold.[a]

Where a purchaser is entitled to maintain an action against a vendor for the recovery of a deposit, he may in such action recover interest on it from the time it was paid without an express agreement; but interest cannot be recovered in an action for money had and received,[b] but the plaintiff must declare specially.

In De Bernales *v.* Wood,[c] which was an action on an agreement for the sale of an estate to recover back the deposit; the plaintiff declared specially, and alleged, by way of special damage, that, by reason of a good title not being made, he had lost and been deprived of the use and benefit of the money he had deposited according to the conditions

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[a] Stewart *v.* Alliston, 1 Mer. 26.
[b] See Calton *v.* Bragg, 15 East, 223, and the cases there cited.
[c] 3 Camp. Ni. Pri. Rep. 258.

of sale. Lord Ellenborough said, "We have lately held, that interest is not recoverable on money lent, without some evidence of a contract for that purpose: but I think the plaintiff here ought to be allowed interest as special damage, from the day when the purchase ought to have been completed. He avers in his declaration, that by the defendant's breach of contract he has since lost the use of his money; and he has proved that averment. There seems to be no reason, therefore, why this loss should not be compensated to him by the allowance of interest on his deposit."

And where a purchaser recovers the deposit in an action against the auctioneer, he may afterwards in an action against the vendor recover interest on such deposit, under an averment of special damage.

Thus, where the purchaser at an auction of a reversionary interest in Bank stock, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, it was held, that he might nevertheless recover interest on the deposit in an action against the vendor for not completing his contract, under an averment of special damage in the plaintiff's losing, by reason of the non-performance, the interest and benefit of his money.[a]

If a vendor cannot make a good title, and the purchaser's money has been lying ready without

[a] Farquhar *v.* Farley, 7 Taunt. 593.

interest being made by it, the vendor must pay interest to the purchaser.[a]

SECT. 2.—*Of the Vendee's Right to maintain an Action for Non-compliance with the Conditions of Sale.*

IF the vendor fails to comply with the conditions of sale, the vendee may maintain an action against him for such non-compliance, or he may rescind the contract, and recover back his deposit, or, as will be seen hereafter in the case of a purchase of real property, file a bill in equity against him for a specific performance.[b]

By bringing an action for the non-performance of the agreement the vendor affirms such agreement.[c]

A purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose he has lost, where the vendor is without fraud unable to make out a good title; and therefore if he affirm the agreement by bringing an action for the non-performance of it, he will obtain nominal damages only for the loss of his bargain.[d]

If the purchase money has been ready and no interest has been made of it, the purchaser may recover interest upon it.[e] And where he declares on the original contract, and lays the expenses in-

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[a] Flureau v. Thornhill, 2 Black. 1078.

[b] Lewis v. Lord Lechmere, 10 Mod. 503.

[c] 2 Burr. 1011.

[d] Flureau v. Thornhill, 2 Black. 1078. 3 Bos. & Pull. 167.

[e] Flureau v. Thornhill, ubi sup. Richards v. Barton, 1 Esp. Ni. Pri. Rep. 268.

curred in investigating the title as special damages, he will be entitled to recover them.[a] But interest cannot be recovered under a count for money had and received.[b] Nor can the expenses incurred in investigating the title, &c. be recovered under a count for money paid.[c]

In an action brought by a purchaser for non-performance of a contract, he will be compelled to deliver to the defendant a particular of every matter of fact which he intends to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he will not be bound to state in such particular, any of the objections in point of law arising upon the abstract delivered.[d] But, as we have seen before,[e] where there has been no particular delivered, a plaintiff will be entitled to a verdict, by proving an infraction of the conditions of sale never before mentioned to the defendant.

As the authority given to an auctioneer to sell is personal and cannot be delegated, a purchaser can have no remedy against the owner of property, under a contract entered into by the auctioneer's clerk without the authority of such owner.[f]

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[a] Richards v. Barton, 1 Esp. Ni. Pri. Rep. 268. Flureau v. Thornhill, ubi sup.

[b] Tappenden v. Randall, 2 Bos. & Pull. 472. Walker v. Constable, 1 Bos. & Pull. 306.

[c] Camfield v. Gilbert, 4 Esp. Ni. Pri. Rep. 221.

[d] Collett v. Thompson, 3 Bos. & Pull. 246.

[e] Ante 153.

[f] Coles v. Trecothick, 9 Ves. Jr. 251. 236.

### SECT. 3.—*Of the Vendee's Right to compel a specific Performance by Bill in Equity.*

WE have seen, that where a vendor fails to comply with the conditions of sale, the purchaser may either bring an action against the vendor and recover damages for the non-performance, or he may maintain an action against him for the recovery of his deposit; and we now come to the vendee's right to compel a specific performance by bill in equity.

The leading case upon this subject, is Coles *v.* Trecothick,[a] which was a bill filed to compel a specific performance of an agreement for the sale of an estate by the defendant to the plaintiff. It appeared, that the defendant had proposed to convey all his estates to C. and S. in trust, to sell for the payment of his debts: that no conveyances were executed: that it was resolved to dispose of the estate in lots, and that it was divided into 22 lots by the defendant, his solicitor, and the auctioneer, who fixed the prices, but that the trustees did not interfere: that at the sale the principal lot was bought in for 19,350*l.*: and that after the sale a meeting was had to consider of the lots unsold, at which the defendant's solicitor declared, that the defendant had desired him to offer the principal lot to C., the trustee, or to his father, the plaintiff. C. being a trustee, declined the pur-

[a] 9 Ves. Jr. 234.

chase; but he afterwards informed the auctioneer and the defendant's solicitor, that his father would become the purchaser at 20,000*l.*; whereupon an agreement was written on one of the particulars, and signed for the plaintiff by his solicitor, and by the auctioneer's clerk (who had an authority from the defendant to sell) thus: "Witness E. P., for Mr. S., agent for the seller." The plaintiff's solicitor paid down a deposit of 2000*l.*; but soon after the defendant applied to C., requesting that his father (the plaintiff) would relinquish the purchase, as another person had offered 25,000*l.*, but the plaintiff refused. The defendant, by his answer, insisted that C. was not authorized by his father to offer 20,000*l.*, and he relied on the statute of frauds: he also insisted that S. and P. were not authorized to sell, and that the payment of the 2000*l.* could not be considered a part performance. P. deposed that he signed or witnessed the contract for S., as agent for the seller in the usual course of business in his absence. C. deposed that he was authorized by his father to offer 20,000*l.* The Lord Chancellor declared his full opinion that P. as the clerk of S. was in this case an agent lawfully authorized, within the meaning of the statute of frauds, to sign the contract; but his Lordship did not agree that auctioneers' clerks in general had that authority. His Lordship then proceeded to state two questions in this case; first, whether there was any such agreement as the

Court could carry into execution? secondly, if there was, whether the circumstances which had led the parties to contract were such, not as to call upon the Court to say, the contract did not bind them, but that the Court would refuse the plaintiff the relief beyond the law of a specific performance, leaving him to make what he could of his action for damages at law? His Lordship said, that this case as a contract was proved beyond all possibility of doubt; it was an agreement made under the sole interposition of the defendant, without any interference of the trustees, except their sanction, and therefore not to be impeached. As to a purchase by a trustee from the *cestuique trust*, his Lordship agreed, that a *cestuique trust* might deal with his trustee, so that the trustee might become the purchaser of his estate, but that it was a transaction of much delicacy, and which the Court would watch so diligently that it was very hazardous. Considering this case then, with reference to the delicacy of a purchase by a creditor, (for the plaintiff was a creditor of the defendant) his Lordship said, it was clearly proved that the defendant meant to sell this lot for 20,000*l.*, and that 25,000*l.* was not offered him till after he had closed with the plaintiff's son. That inadequacy of price was out of the question there; that in fact, inadequacy, unless amounting in itself to conclusive and decisive evidence of fraud, was not a sufficient ground for refusing a specific performance. That

accidental subsequent advantage was nothing, for it had been held, that a contract to sell an estate for a life annuity, if signed, must be executed, though the vendor dies before the end of the first half year. And a specific performance of the agreement was decreed.

Specific performance of a contract by a competent party, and in its nature and circumstances unobjectionable, is as much a matter of course as damages at law.[a]

Mere difference in value though considerable is not of itself a sufficient ground for refusing a specific performance.[b]

A bill for a specific performance of a contract must charge that it was signed by the party, or his agent duly authorized; and that authority must be either proved or admitted before a decree can be made.[c]

### SECT. 4.—*Of the Vendee's Right of Set-off in Action brought against him by Vendor.*

IT seems, that if an auctioneer at the time of the sale does not disclose the name of his principal, but sells goods as his own, a purchaser will under such circumstances be entitled, in an action brought against him by the principal for the price of such

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[a] Hall v. Warren, 9 Ves. Jr. 608. White v. Damon, 7 Ves. Jr. 30.

[b] Per Lord Eldon, in Emery v. Wase, 8 Ves. 517.

[c] Per Lord Eldon, in Howard v. Braithwaite, 1 Ves. & B. 208.

goods, to set off a debt due to him from the auctioneer;[a] but as this right is founded upon the principle, that where the buyer has been induced to enter into a contract, under an impression that his contract is with one person, he cannot afterwards be defrauded of the rights which he has against that person by the introduction of a third, to whom he was a stranger; it can only exist in those cases where the purchaser deals with the auctioneer as a principal.

### SECT. 5.—*Of the Vendee's Right of Action after the Sale has been completed for Deceit and Breach of Warranty.*

IF, after the purchase money has been paid and the sale completed, it appears that there was any defect in the article sold, of which the seller was aware but fraudulently concealed, and which the buyer had not the means of discovering by the exercise of ordinary diligence, the purchaser may maintain an action upon the case for a deceit in the sale.

Thus, in an action upon the case for a deceit in the sale of some pimento, it appeared, that in sales by auction of drugs, it is usual, if they are sea damaged, to express it in the broker's catalogue; and that pimento, although not damaged,

[a] George *v.* Clagett and another, 7 T. R. 359. 2 Esp. Ni. Pri. Rep. 557. Scrimshire *v.* Alderton, 2 Str. 1182.

yet if it has been repacked, or is contained in bags that have been discoloured by sea water, produces a less price in the market than pimento of the same quality which has not been repacked nor the bags discoloured, either of those circumstances bringing it into discredit; and it also appeared, that the defendants had purchased the pimento a short time before at a sale, at which it was described as sea damaged, repacked it, and advertised it for sale in catalogues, which did not notice that it was sea damaged or repacked, but referred it to be viewed, with little facility however of viewing it; and they exhibited fair and impartial samples of the quality, and sold it by auction. It was held, that this was equivalent to a sale of the goods as and for goods that were not sea damaged or repacked, and that an action lay for the deceit.[a]

And it has been held,[b] that an action will lie against a vendor for asserting that the estate was let at a higher rent than was actually reserved, as the actual amount of the rent reserved is known only to the vendor and his tenant; and if they are in confederacy, and the tenant refuses to inform the purchaser, he can have no means of obtaining accurate information. And the purchaser may even maintain an action against the vendor, although he did not rely upon the vendor's state-

[a] Jones v. Bowden, 4 Taunt. 847.

[b] Lysney v. Selby, 2 Lord Raym. 1118; and see the same case reported in 1 Salk. 211, nom. Risney v. Selby.

ment of the amount of rent paid, but made further inquiry.[*]

But the putting down the name of an artist in a catalogue as the painter of any picture, is not such a warranty as will subject the seller to an action, if it turns out that it was not the work of the artist to whom it was attributed.

Thus, where an action was brought to recover damages on the sale of two pictures, one of which was described in the catalogue as a sea piece by Claude Loraine, the other a fair by Teniers, which the defendant had sold to the plaintiff as originals, when in fact they were copies. Lord Kenyon said, "It is impossible to make this the case of a warranty; the pictures were the works of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That in the opinion of the seller the picture is the work of the artist whose name he has affixed to it. The action in its present

[*] Lysney v. Selby, sup.

[*] A purchaser may maintain an action against a third person, not interested in the property, for a false affirmation made by him with intent to defraud the purchaser; and for the purpose of maintaining this action, it is not necessary to shew either that the defendant was benefited by the deceit, or that he colluded with the person who was; but it will be sufficient to prove that the representation was fraudulently made. And a material suppression of the truth will in such case be considered sufficient evidence of fraud. Pasley v. Freeman, 3 Term. Rep. 51. Haycraft v. Creasy, 2 East, 92. Tapp. v. Lee, 3 Bos. & Pull. 367. Eyre v. Dunsford, 1 East, 318.

shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase."[a]

We have seen, that where goods sold are delivered, but in a state different from that in which they appeared or were represented to be at the time of the sale, the purchaser may recover damages against the seller in an action on the case; but it seems quite clear, that where the goods are not delivered at all and the purchase money has been paid, the purchaser may either declare specially on the contract, and obtain damages for the non-delivery, or he may recover the money which he has paid in an action for money had and received.

Thus where turpentine in casks was sold by auction at so much per cwt. and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers, on which account the two last casks were sold at uncertain quantities, and a deposit was to be paid by the buyers at the time of the sale, and the remainder within 30 days, on the goods being delivered, and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those 30 days, after which they were to pay the rent; and the buyers

[a] Jendwine v. Slade, 2 Esp. Ni. Pri. Rep. 572.

having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to gauge, but before he could fill up the rest, a fire consumed the whole in the warehouse within the 30 days. It was held, that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them gauged, without which they could not have been removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done by him as agent for the buyers, whose concern the gauging was. But that the property in the casks not filled up, remained in the sellers, at whose risk they continued, and that the purchaser was therefore entitled to recover the money which he had paid for the casks, which at the time of the fire remained at the risk of the seller.[a]

[a] Rugg v. Minett, 11 East, 210. See Hanson v. Meyer, 6 East, 614.

## CHAP. VI.

### OF THE RESPECTIVE RIGHTS AND OBLIGATIONS OF AUCTIONEER AND PURCHASER TOWARDS EACH OTHER, AND OF THE REMEDIES TO ENFORCE THE SAME.

SECT. I.—*Of the Auctioneer's Right of Action to recover Payment for Goods sold.*

AN auctioneer has such an interest in goods intrusted to him for the purpose of sale, as will enable him to maintain an action in his own name against a purchaser, for goods sold and delivered; and he may maintain such action, though the goods are sold on the premises of the owner, and it is known whose property they are.[a]

But if an auctioneer sells goods and delivers them without demanding payment, and without giving notice to the purchaser of any lien or claim which he has upon them, and the buyer without such notice settles with the owner, the auctioneer cannot maintain an action against the purchaser for the price.[b]

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[a] Williams *v.* Millington, 1 H. Black. 81.

[b] Coppin *v.* Walker, 7 Taunt. 237.

And although the auctioneer represents the goods to be the property of A. and the purchaser settles with A. as the owner, yet if the goods were in fact the property of B. the auctioneer cannot maintain an action against the purchaser, for the price for which they were sold.

Thus in Coppin *v.* Walker,[a] which was an action brought by an auctioneer who had been employed to sell by auction the goods of Appleton, in Appleton's house, and he printed and published a catalogue, entitling the goods as Appleton's goods, and he entered them all at the Excise-office without distinction as the goods of Appleton. The defendant was the holder of a bill of exchange for 31*l.* 11*s.* accepted by Appleton, due and unpaid; he attended the sale, purchased articles amounting to 23*l.* 12*s.* 8*d.*, obtained the goods, and before any demand made by the plaintiff, went to Appleton, who set off the amount thereof against the bill, and paid the defendant the balance, who thereupon gave up the bill. Certain of the articles which he had purchased, to the value of 17*l.* 15*s.* were, however, the goods of Appleby, and had been included in the sale by the plaintiff, without the privity of Appleton, or of the defendant, who supposed that he was buying the goods of Appleton. The plaintiff insisted upon payment to himself for all the goods, which the defendant refused. The Jury, under the direction of Wood, B. found a verdict for the plaintiff, for 23*l.* 12*s.* 8*d.* with liberty

[a] Ubi supra.

to the defendant to move to enter a nonsuit, or reduce the verdict to 17*l.* 5*s.* the amount of Appleby's goods. And upon a motion for that purpose, Dallas, C. J. said, "This is an action brought by an auctioneer to recover the value of goods, which are now stated in part to belong to Appleby, but which he sold as the goods of Appleton. It is said he had a special property in the goods intrusted to him to sell. He proves to be the agent of Appleton and Appleby, and his sale belongs in part to each: but it is represented in the catalogue as wholly consisting of the goods of Appleton, and is so entered at the Excise-office, and the goods are sold on Appleton's premises. The defendant is induced probably by this representation to become a purchaser, that he may have the opportunity to set off the price of the goods which he buys against the bill which he held, payable by Appleton to him. If he is deprived of effecting this object, this misrepresentation must operate as a fraud with respect to him: he buys the goods as Appleton's, on the representation of the plaintiff that they are such; he takes them away by the consent of the plaintiff (without which he could not take them), without any demand of the price being made by the plaintiff, or any statement that Appleton was indebted to the plaintiff for commission, or auction duty, or any thing else. They were therefore delivered as the goods of Appleton, and as such, the defendant had a right to treat and pay for them: the plaintiff has concluded himself by his own act."

### SECT. 2.—*Of the Vendee's Right of Set-off in Action by Auctioneer.*

HAVING shewn that an auctioneer may maintain an action in his own name against a purchaser for the price of goods sold, the next subject of inquiry seems to be, what right the purchaser has to set off in such action a debt due to himself, either from the vendor or from the auctioneer.

Where an auctioneer sells goods, and delivers them without receiving payment, it has been held,[a] that by such delivery he parts with his lien, and that in an action brought against the purchaser in the name of the auctioneer, the purchaser may set off against the price a debt due to him from the owner of the goods.

And where an auctioneer sells the goods of A. in a sale of the goods of B., this is such a fraud as will entitle a purchaser of the goods of A., in an action brought against him by the auctioneer for the price of such goods, to set off a debt due to him from B.[b]

### SECT. 3.—*Of the Vendee's Right to recover back the Deposit from the Auctioneer.*

WHERE a deposit is paid on a purchase, and the vendor fails to comply with the conditions of sale, the purchaser may, we have seen, either affirm the agreement by bringing an action for the non-

[a] Coppin v. Craig, 7 Taunt. 245. [b] Ibid.

performance of it, or in the case of real property, by filing a bill for a specific performance, or he may disaffirm it *ab initio*, and maintain an action against the vendor for money had and received to the purchaser's use; but as the deposit is frequently paid into the hands of the auctioneer, it is necessary to consider under what circumstances the vendee may recover from the auctioneer a deposit which has been paid to him. And it may be laid down as a general rule, that wherever a purchaser might have recovered his deposit from the vendor if it had been paid into his hands, he may on similar grounds, where it has been paid into the hands of the auctioneer, recover it from him, in an action for money had and received.[a]

There are many cases reported, in which actions have been brought against auctioneers for the recovery of deposits which have been paid into their hands, a few of which will be noticed here.

Concealment of a circumstance affecting the value of the property sold will vitiate the sale, and the purchaser at such sale will be entitled to recover his deposit, in an action against the auctioneer for money had and received.

Thus in an action of assumpsit brought against an auctioneer, to recover the deposit paid on the purchase of certain leasehold premises, which the defendant had sold by auction, and of which the plaintiff had become the purchaser. It appearing that the premises, which consisted partly of a public-

[a] See chap. v. s. 1, and the cases there referred to.

house and other buildings, were at the time of the sale in a very dilapidated state, and that, by the terms of the original lease, the lessor was entitled to re-enter, in case the premises were not put into repair within the space of three months next after notice given to the lessee to that effect. That notice to repair had been served upon the lessee (the vendor) on the day before the sale, but that this circumstance had not been communicated to the plaintiff, and he had afterwards been ejected from the premises in consequence of the breach of covenant. It was answered on the part of the defendant, that he himself was not aware of the notice when the premises were put up to sale, and that the plaintiff himself was well aware at the time of the ruinous state of the premises. But Abbott, C.J. held, that a person putting up premises for sale was bound to know how the premises were circumstanced, and whether notice of re-entry had been given by the landlord, in case the premises should not be put into repair. In such transactions good faith was most essential, and that the vendor or his agent was bound to communicate to the vendee the fact of such notice.[a]

The opinion delivered by the Ch. J. in the above case has since been confirmed by the Court of King's Bench, in the case of Coverley *v.* Burrell,[b] which was an action against an auctioneer to re-

[a] Stevens *v.* Adamson, 2 Stark. Ni. Pri. Rep. 422.
[b] 5 Bar. & Ald. 257.

cover the deposit paid on a sale by auction, and in which it appeared, that by a public act the Waterloo Bridge Company were authorized to raise money for the purpose of completing their undertaking, either among themselves, or by granting annuities for term of years or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company, however, in the original grant reserved to themselves a power of redemption; and the Court of King's Bench held, that under these circumstances an auctioneer, putting up to sale one of these annuities, was bound in his particulars of sale to describe it as a redeemable annuity, and that his having concealed the circumstance of its being redeemable rendered the sale void. And Abbott, C. J. said, "It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it; for the buyers act on the faith of those descriptions. We ought not, therefore, to be astute in curing the defects which are apparent on the face of these particulars. It is true, that an annuity may be redeemable, but it is not necessarily so; and it is not redeemable, unless there be a special provision to that effect in the deed granting it. The purchaser had no reason to suppose, in this case, that the annuity was redeemable. He could not have learnt that from the act of parliament, which contains no provision to that effect.

And, under these circumstances, it appears to me that he might naturally expect that he was to purchase an absolute, and not a redeemable, annuity. I am of opinion that, in the present case, it was incumbent on the auctioneer, who offered the annuity for sale, to describe it as a redeemable annuity. There must, therefore, be judgment for the plaintiff."

And where a lessee of lands, subject to a covenant against certain obnoxious trades, with a proviso for re-entry, granted underleases of houses erected on the land, not containing a similar covenant and proviso. Abbott, C. J. held, that a purchaser by auction of houses on the same land, and of the improved ground-rents of the houses so underlet, might, in an action against the auctioneer, recover back his deposit money, this omission in the underlease not having been mentioned in the conditions of sale.[a]

And where the vendor fails to comply with the conditions of sale, the purchaser may maintain an action against the auctioneer to recover his deposit.

In the case of Berry *v.* Young,[b] which was an action brought to recover back the deposit money paid by the plaintiff, who was the purchaser of an annuity sold by the defendant, an auctioneer, on the ground that the vendor had not shewn a title to the annuity by the day specified in the con-

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[a] Waring *v.* Hoggart, 1 Ryan & Moody, Ni. Pri. Rep. 39.
[b] 2 Esp. Ni. Pri. Rep. 640, *n.*

ditions of sale. Lord Kenyon held that the plaintiff was entitled to recover.*

And it seems, that an auctioneer is considered as a mere stakeholder and depository, and that he will be answerable to a purchaser for the deposit, even after he has paid it over to his principal.

Thus where the defendant, who was an auctioneer, had sold to the plaintiff by auction an interest in land, for which the plaintiff had paid him a deposit of *50l.*, but upon an objection to the title, and the want of disclosure of certain circumstances, which ought to have been disclosed at the time of the bidding, the plaintiff declined going on with the contract, and the Court thought she had sufficient reason for so doing. The plaintiff, therefore, required the auctioneer to pay her back her deposit, which he refused to do, whereupon the plaintiff commenced an action against him for the recovery thereof, and obtained a verdict for the amount of the deposit. And afterwards, upon a motion made for a new trial, the Court of King's Bench was clearly of opinion that the action lay against the auctioneer, and said, "The money does not appear to have been paid over by him to his principal. But if it had been so, yet the objection appears to have been made before it either was or ought to have been so paid over. He was a stakeholder, a mere depository of the 50*l.*, and ought not to have parted with it till such time as

* See also Spurrier v. Elderton, one, &c. 5 Esp. Ni. Pri. Rep. 1

the sale should be finished and completed, and it should appear in the event to whom it properly belonged."[b]

Whether the above case would at the present day be supported to its full extent seems doubtful. It has since been cited in the Court of Common Pleas, but the Judges cautiously refrained from expressing their opinions upon it.

In a late case, in which an attorney, who was also an auctioneer, received a deposit on property, which he had sold by auction, and after queries raised on the title and before they were cleared, paid over the deposit to his principal. On a demand of the deposit by the buyer, he answered, that his principal would not consent to return it, and would enforce the contract. The buyer commenced an action against the auctioneer for the recovery of his deposit, and at the trial, Dampier, J. thought that he was entitled to recover as for money had and received to the plaintiff's use: 1st, because the defendant as attorney had notice that the title had not been completed before he paid over the money; and secondly, because he misled the plaintiff to sue himself, by not saying he had paid it over. A rule nisi was afterwards obtained by the defendant to set aside the verdict, and have a new trial; and after the case had been ably argued on both sides, Gibbs, C. J. said, "There is no question in this case, but on the single point, whether the

[b] Burrough v. Skinner, 5 Burr. 2639.

defendant has placed himself out of the reach of this action, by having paid over the money to his principal. It is not disputed, but that the plaintiff is entitled to recover back his deposit; but, says the defendant, he ought not to recover it from me, because I have paid over the money to my principal, and the plaintiff may sue the principal. On the first of the two grounds which Dampier, J. took at the trial, we think the action is maintainable. I do not say that the case in 5 Burr.[a] is not maintainable to the utmost extent to which it goes; but it is not necessary to go so far for the purposes of the present action; for this defendant is the attorney to the vendors, as well as auctioneer; and it is quite clear he must have known that the title was disputable in the view the purchaser had of it; for he knew no answer had been given in due time to the queries which the purchaser had made, even supposing that a satisfactory answer could be thereafter given. In this view we think he paid the money over in his own wrong, and that it may be recovered from him by the plaintiff." The other Judges concurring in opinion with the C. J., the rule for a new trial was discharged.[b]

And to an action founded on the implied promise that the vendor of goods did not know his title to them was bad, it is no defence that he was a sheriff's auctioneer, and desired the plaintiff to give him a written notice not to pay over the pro-

[a] Ante 177. [b] Edwards v. Hodding, 5 Taunt. 815.

ceeds, and that the plaintiff having omitted to give such notice, the defendant paid them over.[a]

If a deposit is paid into the hands of an auctioneer, though he is to a certain degree a stakeholder for both vendor and vendee, yet so far as respects any risk as to the deposit, he is considered only as the agent of the vendor; therefore, if the auctioneer becomes bankrupt or insolvent, any loss thereby occasioned must be borne entirely by the vendor; and the vendor may, upon motion in a court of equity, obtain an order for the auctioneer to pay the deposit into court, which on large purchases it is always prudent to do, as well for the sake of security as for the purpose of obtaining interest on the deposit; but the auctioneer will by such order be directed to pay the deposit into court, *minus* his charges and expenses.[b]

It is clear, that where a purchaser is entitled to recover his deposit, he is also entitled to recover from the vendor interest on it from the time of payment, but in an action against the auctioneer he can only recover interest under particular circumstances.

In Farquhar *v.* Farley,[c] which was an action brought against the vendor by a purchaser to recover interest on his deposit after he had obtained

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[a] Peto v. Blades, 5 Taunt. 657.

[b] Brown v. Fenton, 14 Ves. Jun. 144. Annesley and another v. Muggridge and another, 1 Madd. 593. Smith v. Jackson and Lloyd, 1 Madd. 618.

[c] 7 Taunt. 593.

a verdict for the deposit itself in an action against the auctioneer, Gibbs, C. J. said, "Here the plaintiff, knowing that the money was paid to the auctioneer, to be held merely as a stake, subject to be instantly paid over on performance of the contract at any time, could not recover interest against him, unless under particular circumstances. If indeed it had appeared that the auctioneer had actually made interest of the money, it might have been a question, whether that interest might not be recovered against the auctioneer;" and his Lordship added, "an auctioneer generally is not liable for interest, but he may by his conduct render himself liable, e. g. if, when the title ought to be made out, the auctioneer was called on to pay over and refused, he might be liable from that time."

And where a purchaser of an estate by public auction deposited a sum with the auctioneer as part of the purchase money, until the vendor made out a good title according to the conditions of sale. No good title was made out, but the treaty was kept open with the auctioneer for four years from the time of the sale, and no demand had been made on him for the re-payment of the deposit. It was held that in such case the auctioneer was not liable to the purchaser for interest on the deposit money; and Dallas, J. said, "As this case was tried before the Lord Chief Justice, and as it is certainly a case of considerable consequence, it is better, perhaps, that we should communicate with

his Lordship before we come to a decision upon it. Were I called on now to decide, I should, under the circumstances of the case, feel no difficulty whatever; but, on the general question, I should feel much doubt; for the question of an auctioneer's liability to interest has in many cases been raised, but in none decided. My brother Lens has argued on the true ground, by tracing the supposed liability of the auctioneer to its origin. The principal and auctioneer stand on very different ground; the principal contracts with the purchaser, that he has a good title to the estate to be sold, and on the faith of that induces the purchaser to divest himself of the possession of his money; but the auctioneer's contract is only to hold the money, and at the moment when one of the parties becomes entitled to it, to deliver it to such party. After failure to complete the contract, demand made on the auctioneer for the deposit money and refusal by him to return it, I should think that the purchaser might possibly be entitled to interest from the time of such refusal; and that the auctioneer would under such circumstances retain the money at his own peril. But in this case the negociation was kept open, and no demand was ever made: I should therefore, if now called on to decide, say, that there was no ground on which the plaintiff can be entitled to recover. I was at first greatly struck with the delay which had intervened in this case; but that impression is much weakened, upon

observing that the treaty, during all the time of such delay, was kept on foot." And Burrough, J. said, "An auctioneer can never be liable to interest unless two circumstances concur: first, the contract must, on failure of the condition, be rescinded; secondly, a demand of the deposit must be made and a refusal to return it must be given."[a]

In the case of Maberley *v.* Robins,[b] which was an action brought by the purchaser of an estate against the auctioneer to recover back a deposit paid upon the purchase, there was no count for interest of money, and the Jury found a verdict for 1800*l.* the deposit, and 75*l.* interest; and liberty was given to the defendant to move to enter a nonsuit, if, under the particular circumstances of the case, the Court should think the action could not be maintained at all, and to reduce the verdict by the amount of the interest, if the Court should think the plaintiff was not entitled thereto. The Court refused a rule for entering a nonsuit, but as to the interest granted a rule nisi, and the plaintiff's counsel, on a subsequent day, consented to reduce the verdict by striking off the interest.

But if an auctioneer dispose of property with-

[a] Lee *v.* Munn, 8 Taunt. 45. In this case, Dallas, J. said, "Unless the Court say any thing further on this case, it may be taken that it is decided by the Court upon the very special circumstances thereof; the treaty with the auctioneer having been kept open, and the contract not having been rescinded. The Court studiously abstain from deciding the general question." The case was not mentioned again, and Gibbs, C.J. was understood to have concurred in the judgment.

[b] 5 Taunt. 625.

out having a sufficient authority for so doing, so that the purchaser is unable to obtain the benefit of his purchase, the auctioneer will be liable to pay, not only such costs as the purchaser may be put to in investigating the title, &c., but also interest upon the deposit, and the interest of the purchase money, if it has been unproductive.

Thus where an auctioneer, having authority to sell an estate at any time before Midsummer 1803, put it up for sale at Garraway's before that time, but a sufficient sum not being offered the estate was bought in. He again offered it for sale in September 1804, when it was sold to the plaintiff for 315*l.* under the usual conditions, and the plaintiff then paid into the hands of the defendant (the auctioneer) 75*l.* as a deposit, but the owner refused to complete the contract which had been so made without his authority. The plaintiff brought an action to recover the deposit money and interest, the expense of perusing the abstract, preparing the conveyance, &c. and for the loss of a good bargain. The premises were valued by a surveyor at 751*l.* The defendant suffered judgment to go by default; and upon the execution of a writ of inquiry the Jury returned a verdict for 350*l.*, being upwards of 250*l.* as damages for loss of the bargain. The Court of Common Pleas set aside the writ of inquiry, and let the defendant in to plead to the action upon paying into Court the deposit money with interest, the costs of investigating the title,

and the costs of the action as between attorney and client.[a]

So where the defendant, an auctioneer, had sold to the plaintiff an estate for 975*l.* without having any authority to do so, the plaintiff had a verdict by consent for 261*l.* which was the amount of the expenses he had incurred, the deposit which he had paid, and interest upon the whole purchase money.[b]

SECT. 4.—*Of Vendee's Right on Non-performance of Conditions of Sale to maintain Action against Auctioneer, Principal not being named.*

WHERE an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract.

Thus where the plaintiff bought a post obit bond at an auction where the defendant acted as auctioneer, and the bond not being assigned within the time agreed upon by the conditions of sale, the plaintiff brought an action of assumpsit against the auctioneer. It appearing at the trial that the name of the principal was not mentioned at the time of the sale, Lord Kenyon said, that though where an auctioneer names his principal it is not proper

[a] Bratt *v.* Ellis, C. B. M. & H. Terms, 45 Geo. III. Sugden's Ven. & Pur. 6th ed. 57.

[b] Jones *v.* Dyke and others, cor. Macdonald, C.B. Sugden's Ven. & Pur. 6th edit. 37.

that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is entitled to look to him personally for the completion of the contract.[a]

And if the conditions of sale are that a certain sum per cent. shall be paid as a deposit, and the auctioneer accepts a less sum, and the principal is not named, the auctioneer cannot afterwards, if an action is brought against him for a breach of the agreement, object that too little was paid.

Thus where a post obit bond was sold by auction, and one of the conditions of sale was that 25 per cent. should be paid as a deposit, it appearing that although the plaintiff was to give 645*l.* for the bond, only 50*l.* was paid down, which it was proved that the defendant agreed to accept as a deposit. Lord Kenyon said, that the defendant, after having agreed to take 50*l.* as a deposit, could not object that too little was paid.[b]

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It may perhaps be proper to say here, that an auctioneer ought generally to state in advertisements that the property will be sold at the time and place fixed upon, *unless previously sold by private contract; in which case notice of the sale shall be*

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[a] Hanson v. Roberdeau, Peake's N. P. C. 120. [b] Ib.

*immediately given to the public:* and if the property is disposed of by private contract, the auctioneer should immediately give notice of such disposition; if he does not, it is apprehended that any person who attends at the place appointed for the sale will be entitled to recover against the vendor or auctioneer any expenses which he may thereby incur.

## CHAP. VII.

### OF AUCTIONEERS AND THE AUCTION DUTIES.

#### SECT. 1.—*Of the Auctioneer's Licence and Bond.*

By 17 Geo. III. c. 50, s. 1, 2, 3, and 4, every auctioneer within the bills of mortality was required to pay 20*s*., and every auctioneer without the bills 5*s*. annually for a licence. Brokers authorized by the Lord Mayor, &c. might act as auctioneers on payment of 5*s*. annually, and no person was allowed to act as an auctioneer or factor at sales of estates, &c. without taking out a licence, which licence was thereby required to be renewed annually; but these sections have since been repealed, and various regulations have from time to time been made in lieu thereof; and lastly, by the 6th Geo. IV. c. 81, by which all the duties then payable on excise licences were repealed, and other duties imposed, it is enacted, that there shall be paid for and upon every excise licence to be taken out by every person exercising or carrying on the trade or business of an auctioneer, or selling any goods or chattels, lands, tenements, or hereditaments, by auction, the sum of five pounds.

By 6 Geo. IV. c. 81, s. 6, it is enacted, "That every excise licence which is authorized or required to be taken out by this act shall be granted, and the duty thereupon imposed shall be paid in and throughout the United Kingdom in manner and form following; that is to say, if any such licence shall be taken out within the limits of the head or chief office of excise in London, then such licence shall be granted under the hands and seals of two or more of his Majesty's commissioners of excise, or of such person or persons as such commissioners shall from time to time employ for that purpose; and the duty thereupon imposed as aforesaid, shall be paid at such head or chief office at the time of granting the licence; or if such licence shall be taken out within the limits of the cities of Edinburgh or of Dublin respectively, such licence shall be granted under the hands and seals of his Majesty's commissioner or commissioners and assistant commissioners of excise acting in and for Scotland or Ireland respectively for the time being, or of any two of them respectively, or of such person or persons as such commissioner or commissioners and assistant commissioners shall from time to time employ for that purpose, and the duty thereupon imposed shall be paid at the chief office of excise in Edinburgh or Dublin respectively, at the time of granting the licence; or if such licence shall be taken out in any other part of the United Kingdom without such respective limits as in that behalf

respectively aforesaid, then and in every such case the same shall be granted under the hands and seals of the collector, or other person having charge of the collection, and supervisor of excise within the collection and district in which such licence is taken out, and the duty thereupon imposed shall be paid to such collector or other person as aforesaid at the time of granting the licence; and such respective commissioners of excise in England, and commissioner or commissioners and assistant commissioners of excise acting in and for Scotland and Ireland respectively, and the person or persons by them respectively employed as aforesaid, and every collector or other person having charge of the collection, and supervisor as aforesaid, is and are hereby respectively authorized and required to grant and deliver every such licence to the person or persons who shall apply for and be legally entitled to receive the same forthwith upon payment of the duty or sum of money thereupon imposed, free from all poundage, fee, gratuity, or any other payment whatsoever."

And by sect. 7 of the same statute it is enacted, that in every licence to be taken out by an auctioneer by virtue of that act, shall be contained and set forth the purpose, trade, or business for which such licence is granted, and the true name and place of abode of the person or persons taking out the same, and the true date or time of granting such licence.

And the same section provides that where two or more persons shall be carrying on business in partnership as auctioneers, each partner shall take out a separate licence.

By sect. 16 it is enacted, that all auctioneers' licences shall continue and be in force from the day of the date of such licences until the fifth day of July following, on which day in each year all such licences shall expire; and every person who shall have taken out such licence, and who shall wish or intend to continue the trade or business for which such licence was granted for any longer space of time, shall take out a fresh licence for the year following, to expire on the fifth day of July, and shall so renew the same from year to year, so long as he shall continue such trade or business, and shall pay in every such case the duty thereupon imposed, at such time and place as thereinbefore mentioned;* and every such person shall in every such case give notice in writing at least twenty-one days before the expiration of his current licence, of such his intention to continue the trade or business for which such licence was before granted to the collector or supervisor, or other person or persons authorized to grant licences for the district or place at which such trade or business shall be carried on; and in cases where the licence is so renewed as aforesaid, and such notice shall have been given, the new licence shall bear date

* Ante 188, 189.

from the day or date of the expiration of the old licence; but where such notice shall not have been given, and in all other cases, the licence shall bear date from the day of the date of the application made for such licence, although any such licence may be delivered at any day subsequent to the date of such application.

And by sect. 17 of the same statute it is provided, that if any person shall *commence or begin* to exercise or carry on the trade or business of an auctioneer, such person *not having before taken out a licence for that purpose*, it shall be lawful for the person and persons authorized to grant licences, to grant such licence for the remainder of the current year in which such licence shall be taken out, ending on the fifth day of July next following the date of the licence taken out by such person, upon payment of such proportional part of the duty thereupon imposed as is thereinafter mentioned; that is to say, if such licence shall be taken out within the first quarter of the current year in which such licence shall be taken out, that is, on or before the 10th day of October, that then the person or persons taking out such licence shall pay the whole duty imposed upon such licence; and if such licence shall be taken out within the second quarter, such quarter expiring on the fifth day of January next following the date of such licence, the person taking out the same shall pay three-fourth parts of the duty imposed upon such licence; and if such licence

shall be taken out at any time within the third quarter, such quarter expiring on the 5th day of April next following the date of such licence, the person taking out the same shall pay one half of the duty imposed upon such licence; and if such licence shall be taken out within the last quarter of such current year, such quarter expiring on the 5th day of July next following the date of such licence, the person taking out the same shall pay one-fourth part only of the duty imposed upon such licence.

And the 20th section of the same statute contains a provision as to the renewal of auctioneers' licences which shall have been taken out under former acts, and which expire between the 5th day of July, 1825, and the 5th day of July, 1826, by which an auctioneer, having a licence which has been taken out under any former act, and which shall expire between the 10th day of October, 1825, and the 5th day of January, 1826, is entitled to a licence for the remainder of the year ending on the 5th day of July, 1826, upon payment of three-fourth parts of the duty imposed upon such licence; where such licence shall expire between the 5th day of January and the 5th day of April, 1826, upon payment of one-half of the duty imposed upon such licence; and where such licence shall expire between the 5th day of April and the 5th day of July, 1826, then upon payment of one-fourth part of the duty imposed upon such licence.

By the 28th sect. of the same statute it is enacted, that if any person licensed to exercise or carry on any trade or business for which an excise licence is required, shall not produce and deliver such licence, to be read and examined by any officer or officers of excise, within a reasonable time after such officer or officers shall demand the production thereof, such person shall for every such offence forfeit the sum of twenty pounds.

And by the 26th sect. of the same statute it is enacted, that every person exercising or carrying on the trade or business of an auctioneer, or selling any goods or chattels, lands, tenements, or hereditaments by auction, without being duly licensed so to do, shall forfeit and lose the sum of one hundred pounds.

And by sect. 32, it is enacted, that all penalties and forfeitures imposed by that act (except in such case where special provision is therein made) shall be sued for, levied, recovered, mitigated, and distributed, by such ways, means, and methods, and in such manner, as by any law or laws of excise in force is or shall in that behalf be directed, provided, and enacted in Great Britain and Ireland respectively.

By the 25th section of the same statute it is enacted, that every person who is required by any law or laws of excise to make entry of his premises, in order to exercise or carry on therein any trade or business, for which an excise licence is required,

shall have his name, and after such name the word "licensed," and added thereto the words necessary to express the purpose, or trade, or business, for which such licence has been granted, painted, placed, and fixed on the outside of his said premises over the principal door or gate; but as auctioneers are not required to make an entry of their premises this clause does not extend to them.

An auctioneer cannot sell either gold or silver plate without taking out a further licence for that purpose, unless such plate is sold on the premises of a person duly licensed to sell plate, and is sold on his behalf; for it is by the 31 Geo. II., c. 32, s. 3, enacted, that no person shall either publicly or privately trade in, vend, or sell any gold or silver plate, without first taking out a licence for that purpose; and by s. 6 of the same statute it is enacted, that all persons employed to sell any gold or silver plate at any auction or public sale, shall be deemed traders in, sellers, or venders of gold or silver plate, within the intent and meaning of that act and shall take out a licence for the same. And by the 43 Geo. III. c. 69, sched. A. every person trading in, vending, or selling any gold or silver plate, or any goods or wares in which any quantity of gold exceeding two pennyweights and under two ounces in weight, or any quantity of silver exceeding five pennyweights and under 30 ounces in weight, in any one separate and distinct ware or piece of goods, is or shall be manufactured,

shall take out a licence annually, and pay for the same the sum of two pounds and sixteen shillings; and every person trading in, vending, or selling any gold or silver plate, or any goods or wares in which any quantity of gold of the weight of two ounces or upwards, or any quantity of silver of the weight of 30 ounces or upwards in any one separate or distinct ware or piece of goods, is or shall be manufactured, shall take out a licence annually, and pay for the same the sum of five pounds and fifteen shillings.

And by 6 Geo. IV. c. 81. s. 8, it is enacted, that every person exercising or carrying on the trade or business of an auctioneer, or selling any goods or chattels, lands, tenements, or hereditaments, by auction, shall, over and above any licence to him granted as an auctioneer, take out such licence as is required by law, to deal in or retail, or to vend, trade in, or sell any goods or commodities for the dealing in, or retailing or vending, trading in or selling, of which an excise licence is specially required, before he shall be permitted or authorized to sell such goods or commodities by auction; and if any such person shall sell any such goods and commodities as aforesaid by auction, without having taken out such licence as aforesaid for that purpose, he shall be subject and liable to the penalty in that behalf imposed upon persons dealing in or retailing, vending, trading, or selling any such goods or commodities without licence, notwithstanding any licence to him

before granted, for the purpose of exercising or carrying on the trade or business of an auctioneer, or selling any goods or chattels, lands, tenements, or hereditaments by auction. But it is by the same section provided, that where such goods or commodities are the property of any person duly licensed to deal in or retail, or to vend, trade in, or sell the same, such person having made lawful entry, of his house or premises for such purpose, it shall be lawful for any person exercising or carrying on the trade or business of an auctioneer, or selling any goods or chattels, lands, tenements, or hereditaments, by auction as aforesaid, being duly licensed for that purpose, to sell such goods or commodities for and on behalf of such person, and upon his entered house or premises, without taking out a separate licence for such sale.

And by the 48 Geo. III. c. 55, sched. D. No. 6, an annual duty of six shillings was imposed upon auctioneers selling carriages by auction; but this duty was repealed by the 6 Geo. IV. c. 7.

It is provided by the 26th Geo. III. c. 59, s. 10, that the commissioners of excise or the major part of them may authorize and empower any auctioneer duly licensed to sell by auction any foreign wine, if it be first proved to the said commissioners that all the duties due or payable in respect of such foreign wine have been fully paid, the examination and proof thereof being left to the judgment of the commissioners; and that such auc-

tioneers so authorized and empowered shall not be liable to any fine, penalty, or forfeiture, for or in respect of such sale. And it seems, that the commissioners of excise may also in like manner authorize and empower any auctioneer to sell British made wines or sweets, or any distilled spirituous liquors or strong waters.[a]

A licensed auctioneer going from town to town in a public stage-coach and sending goods by public wagons, and selling the same on commission, by retail or by auction, at the different towns, is a trading person within the meaning of the 50 Geo. III. c. 41, s. 6,* and must take out a hawker's and pedler's licence.[b]

And it has been held that a person travelling from town to town, and having packages of books, &c. sent after him by public conveyance, and taking rooms at each town and there selling such books, &c. by retail, by auction, is a trading person within the 7th section of the same statute.[c]†

[a] See 30 Geo. III. c. 38, s. 19.

[b] Rex v. Turner, 4 B. and A. 510.

[c] Dean qui tam v. King, 4 Bar. and Ald. 517.

* By this section it is directed, that there shall be paid by every hawker, pedler, petty chapman, and every other trading person and persons going from town to town, or to other men's houses, and travelling either on foot, or with horse, horses or otherwise, in England, Wales, or the town of Berwick-upon-Tweed, carrying to sell or exposing to sell any goods, wares, or merchandize, a duty of 4*l.* for each year; and every person so travelling with a horse, ass, or mule, or other beast bearing or drawing burthen, the sum of 4*l.* yearly for each beast he or she shall so travel with over and above the said first mentioned duty of four pounds.

† By this section it is enacted, "that it shall not be lawful for any hawker, pedler, petty chapman, or

It seems that the selling goods by auction within the city of London, by an auctioneer who has paid the duty for an auctioneer's licence, but who has not been admitted as a broker by the court of mayor and aldermen, does not make him liable to the penalty imposed by the 6 Anne, c. 16,* for acting as a broker without being so admitted.[a]

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any other trading person or persons going from town to town, or to other men's houses, and travelling either on foot, or with horse or horses, either by opening a room or shop, and exposing to sale any goods, wares, or merchandize, by retail, in any town, parish, or place, such person not being a householder there, or the same not being an usual place of his or her abode, or by any other means or device to vend or sell, either by himself or herself, or by any auctioneer, whether licensed or not, broker, appraiser, agent, servant, or other person, on his or her behalf, any goods, wares, or merchandize, whatsoever, by outcry, knocking down of hammer, candle, lot, parcel, or any other mode of sale at auction, or whereby the best or highest bidder, is or shall be deemed to be the purchaser; and that every person and persons so vending or selling contrary to such prohibition as last aforesaid, shall forfeit and pay for every offence the sum of fifty pounds."

* By section 4 of this statute it is directed, that all persons that shall act as brokers within the city of London and liberties thereof, shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and limitations, &c. as that court shall think fit and reasonable, and shall upon admission pay to the chamberlain of the said city for the time being the sum of 40*s.* and shall also pay a similar sum annually. And by the 5th section it is enacted, "that if any person or persons shall take upon him to act as a broker, or employ any other under him to act as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending shall forfeit and pay to the use of the said mayor and commonalty, and citizens of the said city, for every such offence the sum of five and twenty pounds, to be recovered by action of debt, in the name of the chamberlain of the said city, in any of her Majesty's courts of record, in which no protection, essoin, or wager of law shall be allowed, or any more than one imparlance."

[a] Wilkes *v.* Ellis, 2 H. Black. 555.

An auctioneer must at the time of taking out his licence give security by bond for payment of the auction duty, &c.

Security was, by the first statute relating to sales by auction,[a] required to be given by the auctioneer on taking out his licence, which security and the mode of entering into the same were afterwards altered by the 19 Geo. III. c. 56, and finally, it is by the 42 Geo. III. c. 93, s. 14, enacted, "that every person not already licensed according to the said act,[b] who now, or at any time or times hereafter, doth or shall exercise the trade or business of an auctioneer, or seller by commission, at any sale of any estate, goods, or effects whatsoever, by outcry, knocking down of hammer, by candle, by lot, by parcel, or by any mode of sale at auction, or whereby the highest bidder is deemed to be the purchaser, or who shall act in such capacity within the limits of the chief office of excise in London, shall, at the time of receiving his licence, give security by bond to his Majesty, his heirs, and successors, with two sufficient sureties in manner following; that is to say, himself in the sum of one hundred pounds,[c] and his sureties in the sum of two hundred pounds each, which security the commissioners of excise in England, or any two

[a] 17 Geo. III. c. 50.

[b] 19 Geo. III. c. 56, s. 7.

[c] The 43 Geo III. c. 130, requires that every auctioneer within the limits of the chief office of excise shall enter into a bond with two sufficient sureties, himself in 1000*l.* and his sureties in 200*l.* each, instead of the security required by this act.

or more of them for the time being, or such person or persons as the said commissioners of excise shall from time to time appoint to deliver out the licences by the said act[a] directed, are and is hereby authorized and empowered to take, that the said person who shall exercise such trade or business, or who shall act in such capacity as aforesaid, shall and will deliver every account of the sales by him made, and also make payment of all and every sum and sums of money arising or becoming due for the auction duty for or in respect of all such sales, in manner prescribed in and by the said act of the 19th year aforesaid, as by this or any other act or acts of parliament now in force."

And sect. 15 of the same statute directs, that every person who shall exercise such trade or business, or who shall act in such capacity as aforesaid, in any part of Great Britain not within the limits of the said chief office, shall, at the time of receiving his licence, give security by bond as aforesaid, himself in the sum of 500*l.* and his sureties in the sum of 50*l.* each, which security it is directed shall be taken by the commissioners of excise in England and Scotland respectively, or any two or more of them for the time being, or by such person or persons as they the said commissioners or any two or more of them respectively shall appoint for that purpose, or by the collectors of excise within their respective collections, in like manner as was therein-

[a] 19 Geo. III. c. 56.

before directed with regard to the bonds to be given within the limits of the chief office.

By the 38 Geo. III. c. 54, s. 2, it is enacted, that every auctioneer who shall neglect to make payment within the time limited by law of any duty, charged upon any sale or sales by auction, shall forfeit for every such offence double the amount of the duty which he shall so neglect to pay; and in case, within fourteen days after such auctioneer shall have been convicted in such penalty, and execution or process shall have issued on such conviction to levy the said penalty, no goods or chattels belonging to such auctioneer shall be found whereon the full amount of the penalty can be levied, and such penalty, or any part thereof, shall remain unpaid at the end of the said fourteen days; or if it shall appear that such auctioneer hath acted contrary to the true intent and meaning of his bond, that then it shall be lawful for the commissioners of excise to cause the bond entered into to be put in suit against such auctioneer and his sureties, and in case of a verdict or judgment against such auctioneer, his licence shall thenceforth be void.

And by 6 Geo. IV. c. 81, s. 9, it is enacted, that every bond given by an auctioneer, or person selling any goods or chattels, lands, tenements, or hereditaments, by auction, in any part of the United Kingdom, shall bear date with the day or date of the licence taken out for such purpose, and shall be binding upon the person or persons by whom

such bond was made and entered into from the day of such date, and not from the day on which the same may have been executed and delivered. And by the same clause it is provided, that nothing therein contained shall extend to annul or render void any bond theretofore made, and which should be in force and unexpired on the 5th day of July, 1825, but that every such bond should remain and continue in force until the expiration thereof.

In the 29th year of the reign of his late Majesty, an act was passed to exempt (subject to certain regulations) all piece goods woven in this kingdom, and which should be sold by auction, from the duty imposed on such sales; and by sect. 3 of that act[a] it is enacted, that every person acting as auctioneer at every such public sale by way of auction as aforesaid, shall, over and besides the bond directed by law to be given on receiving his licence, give further security by bond to his Majesty, his heirs, and successors, in the sum of five thousand pounds, with two or more sureties, which security the commissioners of excise, or any two or more of them, for the time being in England and Scotland respectively, or such person or persons as the said commissioners respectively shall from time to time appoint for that purpose, are thereby authorized and impowered to take, that he will, within fourteen days after such sale at auction of any goods woven or fabricated in the loom as aforesaid, deliver at the next office of excise, within such limits as afore-

[a] 29 Geo. III. c. 63.

said, a true, exact, and particular account in writing of the several lots and parcels of such goods which shall have been sold, the amount of the money bid at such sale, and the price of each lot and parcel; and further, that he will not at any time knowingly offer or put up for sale, or sell at auction, any piece goods or other goods woven or fabricated in the loom out of this kingdom, or any goods woven or fabricated in the loom in this kingdom, which shall not be offered or put up for sale, or sold entire in the piece or quantity in which the same were taken from the loom, and in lots, for or on the account of the manufacturer or first purchaser thereof, without charging for every twenty shillings of the purchase money thereof, the said duty, according to the rules and directions of the act of the 17 Geo. III. c. 50, and that he will not be concerned in any untrue or fraudulent contrivance or device, with intent to sell any piece goods or other goods woven or fabricated in the loom contrary to the true intent and meaning of that act. And by sect. 4 of the same act it is enacted, that in case it shall appear that the party entering into such bond hath acted contrary to the true intent and meaning of such bond and of that act, it shall be lawful for the commissioners of excise to cause such bond to be put in suit.

It has been held, that if an auctioneer's bond to the crown is forfeited, the penalty is due, and does not merely stand as a security to compel payment.[a]

[a] Rex v. Christie, 2 Anst. 586.

## SECT. 2.—*Of the Auction Duties payable, and upon whom charged.*

IN this section it is intended to shew, first, what duties are charged by acts of parliament upon sales by auction, and then to specify the several articles which have been exempted from the payment of those duties.

*Of the duties charged upon sales by auction.* By the 43d Geo. III. c. 69, sched. A. a duty of sixpence, and by 45 Geo. III. c. 30, sched. A. an additional duty of one penny are imposed upon every twenty shillings of the purchase money arising or payable by virtue of any sale at auction in Great Britain, of any interest in possession or reversion in any freehold, customary, copyhold, or leasehold lands, tenements, houses, or hereditaments, and any share or shares in the capital or joint stock of any corporation or chartered company, and of any annuities or sums of money charged thereon, and of any ships and vessels, and of any reversionary interest in the public funds, and of any plate or jewels, and so in proportion for any greater or less sum of such purchase money, such duties to be paid by the auctioneer, agent, factor, or seller by commission.

And by the 43 Geo. III. c. 69, sched. A. a duty of ten-pence, and by the 45 Geo. III. c. 30, sched. A, an additional duty of two-pence are imposed upon every twenty shillings of the purchase

money, arising or payable by virtue of any sale at auction in Great Britain of furniture, fixtures, pictures, books, horses and carriages, and all other goods and chattels whatsoever, and so in proportion for any greater or less sum of such purchase money, such duties to be also paid by the auctioneer, agent, factor, or seller by commission.

But by the 55 Geo. III. c. 142, the duty upon sales by auction for the benefit of the growers or first purchasers of sheep's wool, the growth or produce of any part of the United Kingdom, is reduced to the sum of two-pence for every twenty shillings of the purchase money.

By the acts of parliament passed for building, improving, and maintaining the Liverpool docks, the corporation, who are trustees for the purpose of carrying them into execution, are authorized to levy certain rates and duties on the ships and vessels entering and going out of the port of Liverpool; and they are empowered to borrow money for the maintenance of the docks by sale (by auction) of assignments of the rates and duties so imposed on the shipping, securing to the purchasers 100*l.* each with interest till paid. It has been held, that such assignments were not mere chattels, but a charge upon the docks, and therefore an interest in land; and consequently, that the auctioneer selling such assignments cannot be called upon by the excise for the higher duty imposed by the 43 Geo. III. c. 69, and 45 Geo. III. c. 30, on the

sale thereof; for being *an interest in land*, they are liable only to the lower duty.[a]

So the several instruments called bonds, given for securing on the parish rates the payment of 100*l.* each, and interest to the holder, by parishes enabled to borrow money by such means under the local paving acts, have been held not to be mere chattels, but a charge on the owners of houses, &c. in respect of such houses, &c. and therefore when sold by auction are not liable to the higher auction duty imposed on the sale of chattels by the 43 Geo. III. c. 69, and 45 Geo. III. c. 30, but to the lower duties imposed by those statutes, being a sale of an interest in lands.[b]

And as we have before seen,[c] the duty will sometimes become payable where no sale has in fact taken place; as where a price is put under the candlestick, and it is declared that no bidding shall avail if not equal to that, the duty will attach upon the price so placed under the candlestick, if the proper notices have not been given by the owner of his intention to bid.[d] So the duty was held to attach where a female auctioneer immediately after any person bid gave him a glass of brandy, but never spoke during the sale, and she, after the sale was over, in a private room declared that person the purchaser who had received the last glass of brandy.[e]

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[a] Rex v. Winstanley, 8 Price, 180.
[b] Rex v. Bates, 3 Price, 341.
[c] Ante 44.
[d] Cruso v. Crisp, 3 East, 337.
[e] 1 Dow. 111.

And in Walker *v.* Advocate General,* which was heard in the House of Lords on error from the Exchequer, and in which it appeared that estates belonging to the trustees of the Marchioness of Titchfield were advertised to be sold by public auction at Edinburgh, and that a number of persons attended in consequence: that the plaintiff in error, a writer to the signet, was employed by the trustees as their agent to sell the estate: that a licensed auctioneer attended at the place and time of sale, but that Mr. Walker took the most active part in the business. Mr. Walker stated the upset price at 50,000*l.*, but no bidding was made upon that sum. He then stated, that he should be ready to treat for the sale by private contract, and the meeting broke up. Mr. Walker left the house, but soon after, while he stood near it in the street, some gentlemen, who had attended in the public room, came to him, and said they would make an offer, provided it was not communicated to others. Mr. Walker stated, that it would be unnecessary to make any offer, either verbally or in writing, unless it was something better than 50,000*l. and that the best or highest offer above that sum would be preferred without partiality.* In two or three hours after, several offers in writing were delivered to him,

* 1 Dow. 111. It was suggested by Lord Eldon, that the information ought to have been against the licensed auctioneer; but that point had not been noticed below, and there appeared to have been an understanding that no advantage was to be taken of that circumstance.

upon which he went back with them to the coffee-house, opened the letters, and found in one of them an offer of 50,650*l.*; which, being the highest was accepted. It was decided, that Mr. Walker having entered into a treaty with several persons and engaged that the highest bidder should be the purchaser, the case came within the words "or by any other mode of sale at auction, *or whereby the highest bidder is deemed the purchaser*," and that the auction duty attached.

But it seems that he might have taken any individual he pleased and concluded a bargain with him, and that in such case the auction duty would not have attached.[a]

By the 48 Geo. III. c. 55, sched. D. No. 6, a duty of 1*l.* 2*s.* 6*d.* was imposed upon the auctioneer for every carriage with four wheels which he should sell by auction, for or in expectation of profit or reward, and a duty of 11*s.* 3*d.* for every carriage with two wheels which he should so sell; but these duties were repealed by the 6th Geo. IV. c. 7, s. 1; and such carriages are now liable only to the duties imposed by the 43 Geo. III. c. 69, and the 45 Geo. III. c. 30.

By the 19th Geo. III. c. 56, s. 6, certain duties upon sales by auction, imposed by that statute, and which have since been repealed, are declared to be a charge upon every auctioneer or seller by commission immediately from and after the knocking down of the hammer or other closing

[a] 1 Dow. 111.

of the bidding; in lieu of the duties imposed by the last mentioned statute, the duties imposed by the 43 Geo. III. c. 69, 45 Geo. III. c. 90, and 55 Geo. III. c. 142, have been substituted, but the provision made by the 6th section of the 19th Geo. III. c. 56, and other provisions of the same statute have been extended to the duties subsequently imposed.

In a preceding part of this work,[a] it will be seen what powers are given to the auctioneer to enable him to recover the duties with which he is so charged.

By the 17th Geo. III. c. 50, s. 8, it is enacted, that nothing therein contained shall extend to restrain any person acting as auctioneer at any sale by way of auction from making it a condition of sale, that the duty granted by that act, or any certain portion thereof, shall be paid by the purchaser, over and above the price bidden at such sale by auction, and that in such case the person so acting as auctioneer, is thereby authorized and required to demand payment of the duty from such purchaser, or such portion thereof, as is expressed in such agreement, and upon neglect or refusal to pay the same, it is thereby declared that such bidding shall be null and void.

Where upon a sale of lands it was stipulated in the conditions of sale, that the auction duty should be paid by the purchaser, which the purchaser

[a] Ante 35, 36.

accordingly paid, and the vendor afterwards failed in making a good title to the premises sold; Lord Ellenborough held, that the purchaser might maintain an action against the vendor for the amount of the auction duty which he had paid.[a]

*Of the property exempted from the payment of auction duty.* By the 17th Geo. III. c. 50, s. 11, 12, and 13, provisions were made for exempting certain articles therein mentioned from the payment of the auction duties, but other provisions have by the 19th Geo. III. c. 56, been substituted in lieu thereof, and these latter provisons have since been extended to duties imposed by subsequent acts.

By the 19th Geo. III. c. 56, s. 13, it is provided, that the auction duties shall not attach upon any sale or sales by way of auction of estates or chattels made by any rule, order, or decree of his Majesty's Court of Chancery or of Exchequer in England, before the master in Chancery, or the deputy remembrancer of the said Court of Exchequer, or by any order or decree of the courts of great sessions in Wales, or by any order or decree of the Court of Sessions or Exchequer in Scotland, or to any such sales made by the East India Company, or the Hudson's Bay Company, or by order of his Majesty's commissioners for the duties of custom or excise, or by order of the board of ordnance, or commissioners of the navy or victualling offices, nor upon the sale by auction of

[a] Cane *v.* Baldwin and others, executors of Baldwin, 1 Stark. 65.

any goods distrained for rent or non-payment of tithes.

And by s. 14 of the same statute it is provided, that the duty shall not attach upon any auction to be held on the account of the lord or lady of any manor for the granting any copyhold or customary messuages, lands, or tenements for the term of a life or lives, or any number of years; or upon any auction to be held for the letting or demising any messuages, lands, or tenements, for the term of a life or lives, or any number of years, to be created by the person or persons on whose account such auction shall be held, or upon the sale or sales of any woods, coppices, produce of mines or quarries, or upon any contract relating thereto, or to the cutting or working the same, or upon the sale of any materials used in the working of such mines or quarries, or upon the sale of any cattle, and live or dead stock, or unmanufactured produce of land, so as such sale or sales of woods, coppices, produce of mines or quarries, cattle, corn, stock or produce of land be made whilst they continue on the lands producing the same, and by the owner or owners of such lands, or proprietor or proprietors of, or adventurer or adventurers in such mines or quarries, or by his or their steward or agent, stewards or agents.

It has been held that tithes are a tenement within the meaning of the last mentioned clause; and that a letting by auction, of tithes of corn then standing and growing on the ground, to be

transferred by way of lease for one year, to commence from before the day of the auction, is a letting by auction of the tenement, and not a sale of the tithes, even although no actual lease should be afterwards made of such tithes, and that no auction duty therefore attaches upon such letting.[a]

And by s. 15 of the last mentioned statute it is enacted, that no duty shall attach upon any estate, goods, or chattels, sold at auction under the authority of any sheriff, or under sheriff, for the benefit of creditors, in execution of any judgment had or obtained; or any estate or effects of bankrupts, sold by order of the assignee or assignees under any commission of bankruptcy;[b] or upon any goods imported into this kingdom by way of merchandize from any British colony or plantation in America, the same being of the growth, produce, or manufacture, of the said colonies or plantations, on the first sale of such goods by or for the account of the original importer, to whom the same were consigned and by whom they were entered at the custom-house, at the port of importation, so as such sale be made within twelve months after such goods shall be so imported; nor of any ships or their tackle, apparel, and furniture, or the cargoes thereof, which may be taken and condemned as prize, which shall be sold in this

[a] Rex v. Ellis, 5 Price, 323.

[b] This exemption is confirmed by the 6 Geo. IV. c. 16, which is entitled, "An act to amend the laws relating to bankrupts;" by the 98th section of which it is enacted, that "all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty."

kingdom, by or for the benefit of the captors thereof; nor to any ships or goods that may be wrecked or stranded on the coasts of this kingdom, and sold by auction for the benefit of the insurers or proprietors thereof, or which may be sold free of duty to defray the charges of salvage; nor upon goods damaged by fire, and sold by order of, and for the benefit of the insurers of such goods, nor to sales made by trustees, chosen in pursuance of the act of the 12th Geo. III. c. 72, intituled, "An act for rendering the payment of the creditors of insolvent debtors more equal and expeditious, and for regulating the diligence of the law by arrestment and poinding; and for extending the privilege of bills to promissory notes, and for limiting actions upon bills and promissory notes in that part of Great Britain called Scotland."

A tenant in fee mortgaging for 1000 years has no longer any estate or interest in the lands higher than an equity of redemption; and if on his becoming bankrupt his assignees take upon themselves to sell the whole property absolutely as the estate of the bankrupt, it has been held, that such a sale is not within the exemption in the last mentioned clause, and is therefore liable to the auction duty;[a] but such a sale would probably have been considered as exempt from the payment of the duty, if the assignees had previously redeemed the estate.[b] Nor will the Court of Exchequer on such a sale deduct the proportional part of the

[a] Rex v. Abbott, 3 Price, 178. [b] Ibid.

duty payable on the value of the equity of redemption, for they consider the entire duty to be payable by the auctioneer on the whole, at the conclusion of the sale; and if the interests are blended so indiscriminately by the assignees, whose duty it is to keep them apart, the Court will not relieve them.[a]

To prevent the duty attaching, the estate should be sold by the assignees subject to the mortgage.

And it has been held, that a sale by the mortgagee of a bankrupt's estate before the commissioners, under an order of the Lord Chancellor, is not within the exemption, in the 19th Geo. III. c. 56, s. 15, and is therefore liable to the auction duty, it being a sale by a mortgagee, and so no part of the bankrupt's estate.[b]

By the 29th Geo. III. c. 63. s. 1, it is enacted, that all goods whatsoever, woven or fabricated in the loom, in this kingdom, which shall be sold entire, in the piece or quantity in which the same were taken from the loom and in lots, each lot whereof, shall be of the price of 20 pounds sterling or upwards, shall and may be sold by public auction, in lots as aforesaid, for or on the account of the manufacturers, or first purchasers thereof, respectively, by any person duly licensed to exercise the trade or business of an auctioneer, but not otherwise, free from auction duty. And by the 2d section of the same statute it is provided, that no person shall be

[a] 3 Price, 178. [b] Coare v. Creed, 2 Esp. 699.

exempted from the payment of the said duty for or in respect of any such goods sold by way of auction, unless such sale shall be carried on in some warehouse, room, or place, whereof a true and particular entry in writing shall have been made with the proper officer at the next office of excise within the limits where such warehouse, room or place shall be situated, and unless such goods shall be openly shewn and exposed at the time and place of such sale.

By the 28 Geo. III. c. 37, s. 12, it is enacted, that all deer and other skins, the produce of East or West Florida, in America, and which shall be imported into this kingdom directly from thence, may be sold by auction, free of duty, on the first sale thereof, by or for the account of the original importer, to whom the same were consigned, and by whom they were entered at the custom-house, at the port of importation, and provided such sale be made within twelve months next after the importation of such deer and other skins respectively.

The 30 Geo. III. c. 26, s. 1, contains a similar provision respecting all goods imported into this kingdom by way of merchandize, from the settlement of Yucatan, in South America.

The 32 Geo. III. c. 41, contains a similar provision respecting all whale oil, whalebone, ambergris, and head matter, and all skins of seals and other animals living in the sea, and also all elephants' teeth, palm oil, dyeing woods, drugs and

other articles for dyers use, and all mahogany and other unmanufactured wood for the use of cabinet makers and other manufacturers, imported in British ships from Africa or any British settlement abroad.

The 41 Geo. III. c. 42, contains a similar provision respecting all oil made or produced from amphibious animals, called sea cows or sea elephants, and which is commonly called or known by the name of elephant oil.

The 41 Geo. III. c. 91, s. 8, contains a similar provision respecting all wheat, barley, rye, oats, rice, peas, beans, and other corn and grain of every sort, flour, meal, beef, pork, hams, bacon, cheese, and butter, imported into that part of the united kingdom called Great Britain.

And the 42 Geo. III. c. 93, s. 3, contains a similar provision respecting all goods, wares, merchandize, and effects, imported in any British ship or vessel from any British colony or settlement in America, or from any part of the United States of America.

But the time within which coffee imported from any British colony in America may be sold by auction without payment of duty, is by the 52 Geo. III. c. 58, s. 1, extended, and the same is thereby exempted from the payment of duty if sold whilst the same shall be and remain lodged in any warehouse or warehouses under the 46 Geo. III. c. 132, or any other act or acts of parliament relating

the warehousing of goods without payment of the duties.

By the 47 Geo. III. sess. 2, c. 65, it is enacted, that all goods, wares, or merchandize, the produce of the West Indies, brought into any of the docks, basins, or cuts of the West India Dock Company, in the port of London, which shall be sold by the directors of the said company, or under their authority, conformably to the provisions of the 42 Geo. III. c. cxiii. s. 15, 16, which is an act relating to the concerns of the said company, to reimburse themselves for charges incurred for duties, landing, warehousing, interest of money advanced, or for any other purpose respecting the same, shall be free of the duty imposed by law on goods and effects sold by auction.

By the 42 Geo. III. c. 116, s. 113, it is enacted, that no duty shall be payable in respect of any part of the monies which shall arise by sale of any manors, messuages, lands, tenements, and other hereditaments, which may be sold under the powers and provisions of that or any other acts relating to the redemption of land-tax.

By the 55 Geo. III. c. 55, s. 12, it is enacted, that nothing in the several acts imposing duties upon sales by auction shall extend to any sale or sales by way of auction of any estates or chattels belonging, or which shall belong to his Majesty, his heirs, or successors, which shall be made by the order of the commissioners for the time being of

his Majesty's woods, forests, and land revenues, or to charge or subject any such sale or sales of any such estates or chattels, or the auctioneer or auctioneers by whom any such sale or sales shall be made for or in respect thereof, with any of the rates or duties granted by the said acts, or any or either of them, for or on account of any such sale or sales, but that every such sale, and the estates or chattels so sold, and the auctioneer, so far as respects such sale, shall be wholly exempt from such rates or duties.

And by the 5th Geo. IV. c. 75, s. 2, it is enacted, that all goods, wares, merchandize, and effects, which under the provisions of an act made in the fifty-first year of the reign of his late Majesty King George III. intituled, "An act for carrying into effect the provisions of a treaty of amity, commerce, and navigation, concluded between his Majesty and his Royal Highness the Prince Regent of Portugal," shall be imported into any part of the United Kingdom, in any ship or vessel built in any of the territories or dominions in the said act of the 51st Geo. III. mentioned, or condemned as prize there, and being owned and navigated as in the same is mentioned, may be sold by auction free of the duty imposed by law on goods and effects sold by auction: provided that nothing contained in the said act of the 5th Geo. IV. shall extend to authorize the sale of any such goods or effects free of the said duty, unless on the first sale of any such goods or

effects by or on account of the original importer thereof, by whom the same were entered, at the custom-house at the port of importation, nor unless such sale shall be made within twelve months next after the time when such goods or effects shall have been so imported."*

## SECT. 3.—*Of the Duties imposed upon the Auctioneer by Act of Parliament.*

PREVIOUS to the sale, an auctioneer must deliver at the chief office of excise, or to the collector

* By the 51 Geo. III. c. 47, it is enacted, that "any goods, wares, and merchandize, being of the growth, produce, or manufacture of any of the territories or dominions of the crown of Portugal, which are not prohibited by law to be imported into this kingdom, or the islands of Jersey and Guernsey, from other foreign countries, shall and may be imported into this kingdom, and the islands of Jersey and Guernsey, direct from any such territories or dominions, in any ship or vessel built in any of the territories or dominions of the crown of Portugal, or taken by any ship or vessel of war belonging to the Portuguese government, or by any ship or vessel belonging to any of the subjects of the territories or dominions aforesaid, or having commissions or letters of marque and reprisal from the said government, and condemned as lawful prize in any court of admiralty of the said government, and owned by the subjects of such government, or any of them, and whereof the master and three-fourths of the mariners at least are subjects of such government, and such goods, wares, and merchandize, shall and may be entered and landed upon payment of the duties, and subject to the conditions and regulations hereinafter mentioned.

By sect. 4 of the same statute it is enacted, "that it shall and may be lawful for any person or persons to import into this kingdom, elephants' teeth and ivory from any of the said dominions, either in British built ships or vessels owned, navigated, and registered according to law, or in such Portuguese ships or vessels as are in this act before mentioned and described, and owned and navigated in the manner hereinbefore also mentioned and described, notwithstanding such elephants' teeth or ivory may not be of the produce of any of the dominions of the crown of Portugal."

of excise, in whose collection such sale is intended to be, or at the office of excise next to the place where such sale is intended to be, a notice of such sale, and a catalogue of the several articles intended to be sold. For it is by the 19th Geo. III. c. 56, s. 9, enacted, that every auctioneer or seller by commission, selling by auction within the limits of the chief office of excise in London, shall, two days at least before he do begin any sale by way of auction, deliver, or cause to be delivered at the said chief office of excise, to the person who shall be appointed by the commissioners of excise to receive the same, a notice in writing signed by such auctioneer, specifying in such notice the particular day when such sale by auction is to begin, and shall at the same time or within twenty-four hours after, deliver, or cause to be delivered to the person so to be appointed as aforesaid, a written or printed catalogue, attested and signed by such auctioneer, or his known clerk, in which catalogue shall be particularly expressed and enumerated each and every article, lot, parcel, and thing, by such auctioneer intended to be sold at such auction; and that every such auctioneer selling by auction in any part of Great Britain not within the limits of the said chief office of excise shall, at least three days before he do begin any sale by way of auction, deliver, or cause to be delivered to the collector of excise, in whose collection such sale is intended to be, or at the office of excise next to the place

where such sale is intended to be, a like notice in writing, signed by such auctioneer, specifying therein the particular day when such sale is to begin, and shall at the same time, or within twenty-four hours after, deliver, or cause to be delivered to such collector, or at the office of excise next to the place where such sale is intended to be, a written or printed catalogue, attested and signed by such auctioneer, or his known clerk, in which catalogue shall be particularly expressed and enumerated each and every article, lot, parcel, and thing, by such auctioneer intended to be sold at such auction. And that if any auctioneer shall presume to sell any estate, goods, or effects, by way of auction, without delivering the notices and catalogues thereby required to be delivered, or shall at any such sale sell any estate, goods, or effects, not particularly expressed or enumerated in such catalogue, every such auctioneer shall, for every such offence, forfeit and lose the sum of twenty pounds.

By the 32 Geo. III. c. 11, after reciting the 9th section of the last mentioned statute, it is enacted, that every auctioneer who shall have delivered or caused to be delivered any such notice or catalogue for a sale by auction within the limits of the chief office of excise in London, or the person who acted as his clerk at such sale or intended sale, shall within twenty-eight days after the day specified in such notice, as the particular day when such sale by auction was to be made,

deliver, or cause to be delivered at the chief office of excise in London, to the person or persons who shall be appointed by the commissioners of excise to receive the same, a declaration in writing, setting forth whether or not any sale by way of auction had been, or was opened or begun under such notice, or any article, lot, parcel, or thing, contained in such catalogue was bid for or sold at such auction; and such auctioneer or, person acting as his clerk as aforesaid, shall make oath to the truth of such declaration before the commissioners of excise or one of them, or before such person as the commissioners of excise shall appoint to administer the same. And that every auctioneer, who shall have delivered or caused to be delivered any such notice or catalogue for a sale by auction, in any part of Great Britain, not within the limits of the said chief office, or the person who acted as his clerk at such sale or intended sale, shall within six weeks after the day specified in such notice, as the particular day when such sale by auction was to be made, deliver, or cause to be delivered to the collector of excise, in whose collection such sale has been or was intended to be, a like declaration in writing, in manner as is thereinbefore required with respect to persons selling by auction within the limits of the chief office of excise in London, to be verified in like manner, on pain, that every auctioneer shall, for every neglect or refusal of delivering such decla-

ration, verified in the manner above mentioned, forfeit the sum of 50*l.*

By the 19 Geo. III. c. 56. s. 16, it is for the better and more effectually preventing frauds, which might be practised by auctioneers selling estates, goods, or chattels, under the authority of sheriffs or their under sheriffs, or under the order and direction of the assignees under any commission of bankruptcy, enacted, that every auctioneer who shall sell at auction, any estates, goods, or chattels, that have been seized by any sheriff or undersheriff, or by their authority, and by them or either of them taken for the benefit of creditors in execution of any judgment, had and obtained, shall specify and enumerate in the catalogue, by him to be delivered under the directions of that act, as well the particular estates and effects to be sold, as also the exact sum to be levied under such execution; and that the sheriff or under sheriff respectively shall subscribe and sign every such catalogue, and certify at the foot thereof, that all and every the estates, goods, and effects, in such catalogue respectively specified and enumerated, were really and truly the property of the person against whom such judgment was had and obtained, and that the same and every part thereof were actually seized in execution of the same judgment; and that every auctioneer, who shall be employed by the assignees under any commission of bankruptcy, to sell the effects of any bankrupt shall likewise

specify and enumerate in the catalogue, to be by him delivered as aforesaid, the particular goods and effects then to be sold; and that the assignees or assignee, if only one, under such commission, shall subscribe and sign such catalogue, and certify at the foot thereof, that all and every the estate, goods, chattels, and effects in such catalogue, respectively specified and enumerated, were really and truly the property of the said bankrupt at the time of suing forth the said commission, and that the catalogue, so signed and certified as aforesaid, shall be produced by every such auctioneer to the person to whom such auctioneer is by that act directed to deliver his account, before such auctioneer shall be permitted to pass his account, or have the same allowed. And further, that if such sheriff, under sheriff, assignee or assignees, respectively shall insert, or suffer or permit to be inserted, in any such catalogue, so to be subscribed, signed, and certified as aforesaid, any estate, goods, chattels, or effects whatsoever, other than such as were really and truly the property of the debtor or debtors, bankrupt or bankrupts, respectively; or if any sheriff or under sheriff shall omit or neglect to certify on such catalogue the true sum to be levied, or shall certify thereon any false sum to be levied, then and in every such case the party offending shall, for every such offence, forfeit and lose the sum of twenty pounds.

And it is by s. 17 of the same statute enacted,

that every auctioneer, who shall be employed to sell any goods damaged by fire, which shall be sold by order of and for the benefit of the insurer or insurers of such goods, shall specify and enumerate in the catalogue to be by him delivered, the particular goods then to be sold; and that the insurers or insurer, if only one, shall subscribe and sign such catalogue, and certify at the foot thereof, that all and every the goods in such catalogue respectively specified and enumerated, were really and truly sold for the benefit of such insurer or insurers; and that the catalogue so signed and certified shall be produced by every such auctioneer to the person to whom such auctioneer is by that act required to deliver his account, before such auctioneer shall be permitted to pass his account or to have the same allowed; and that, if such insurer or insurers shall insert, or suffer or permit to be inserted, in any such catalogue so to be subscribed, signed, and certified, any goods whatsoever other than such as were really and truly to be sold for the benefit of him or them; or if any insurer or insurers shall omit or neglect to certify on such catalogue the true particular of the goods to be sold, that then and in every such case the party offending shall, for every such offence, forfeit and lose the sum of twenty pounds.

And by the 18th section of the same statute it is enacted, that all fines, penalties, and forfeitures by that act imposed, shall be sued for, levied,

recovered, or mitigated, by such ways, means, and methods, as any fine, penalty, or forfeiture, is or may be recovered or mitigated, by any law or laws of excise, or by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, or in the Court of Exchequer in Scotland; and that one moiety of every such fine, penalty, or forfeiture, (all necessary charges for the recovery thereof being first deducted) shall be to his Majesty, his heirs, and successors, and the other moiety to him or them who shall discover, inform, or sue for the same.

SECT. 4.—*Of the Allowance of Auction Duty, where Estates, &c. bought in by the Owner, or his Agent.*

BY the 19th Geo. III. c. 56. s. 12, it is enacted, that in case the real owner of any estate, goods, or effects, put up to sale by way of auction, shall become the purchaser by means of his own bidding, or the bidding of any other person on his behalf or for his use, at such sale, without fraud or collusion, then the respective commissioners of excise in Great Britain, and such collectors, supervisors, and other officers of excise, as are thereby respectively authorized within their respective collections and districts to receive the said duties, shall make an allowance to such owner of the duties upon such bidding, provided notice be given to the auctioneer before such bidding, both by the

owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for the use and behoof of the seller, and provided such notice be verified by the oath of the auctioneer, as also the fairness and reality of the said transaction to the best of his knowledge and belief.

But by 28 Geo. III. c. 37. s. 20, it is enacted, that no such allowance shall be made, unless notice *in writing*, signed [a] by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for the use and behoof of the seller, shall have been given to such auctioneer before such bidding, nor unless such delivery of such notice shall be verified upon the oath of the auctioneer, as also the fairness of the transaction to the best of his knowledge.

And by the 42 Geo. III. c. 93. s. 1, after reciting, that divers estates, goods, and effects, had been put up to sale by way of auction, and had been bought in for the respective owners, either by the biddings of the agents of such owners, or by the biddings of persons under notices in writing, not signed by the several owners themselves, but signed by the agents of such owners, and also by such persons intended to be the bidders, of the latter being appointed by the agents of such owners,

[a] For form of notice, see Appendix, 232.

and having agreed accordingly to bid at such respective sales for the use and behoof of the sellers, and that it was expedient to make some provision in respect thereof, it is enacted, that an allowance of the auction duty shall be made to the owner on any estate, goods, or effects, which shall be put up to sale by way of auction and bought in for the owner, either by the steward or known agent of the owner, and actually employed in the management of the sale of such estate, goods, or effects, or under a notice in writing,* signed as well by any such steward or agent actually employed as aforesaid, as by the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for the use and behoof of the seller, provided that no such allowance shall be made for or in respect of any such estate, goods, or effects, bought in for the owner by any such steward or agent, unless notice in writing, signed by such steward or agent, of his the said steward or known agent's being about to bid for such owner, shall have been given to the auctioneer before such bidding; and such delivery of such notice so signed shall be verified upon the oath of the auctioneer, and also the fairness and reality of the transaction to the best of his knowledge and belief; and it is also provided, that no such allowance shall be made for or in respect of such estate, goods, or effects, bought in for the owner under any such notice in writing,

* For form of this notice, see Appendix, 233.

signed as well by such steward or agent as by the person intended to be the bidder, unless such notice shall have been given to the auctioneer before such bidding; and the delivery of such last mentioned notice so signed shall be verified upon the oath of the auctioneer, as also the fairness and reality of the transaction to the best of his knowledge and belief.

And by section 2 of the last mentioned statute it is enacted, that no allowance of the auction duty for or in respect of any estate or effects whatever, shall be made on account of any estate or effects having been bought in for the owner under any written notice, unless such notice shall, at the time appointed by law for the auctioneer's passing his account of such sale, be produced by the auctioneer to the proper collector or other officer of excise authorized to pass the account of such sale, nor unless such notice shall be left with such collector or other officer; and that in case any dispute shall arise, whether such purchase by or for the owner was not made by collusion, or in order to lessen the full sum appointed by the acts of parliament in that case made and provided to be paid, or concerning the fairness of such transaction, that then and in such cases the proof thereof shall lie upon the person acting as auctioneer, and that on failure therein, or in case of any unfair practice, no such allowance shall be made.

SECT. 5.—*Of the Right of the Auctioneer or Vendor to have the Auction Duty returned, where the Sale has not been carried into effect on Account of the Vendor's want of Title.*

BY the 19 Geo. III. c. 56, s. 11, is provided, that if any sale by auction of any estate, goods, or chattels, shall be rendered void by reason that the person for whose benefit the same was sold had no title to the same or no right to dispose thereof, it shall be lawful for the auctioneer who paid the duty for the thing so sold, or for the person for whose benefit the same was sold, to lay his, her, or their complaint before the commissioners of excise, or justices of the peace[a] within whose jurisdiction respectively such sale was made, and the said commissioners of excise, or justices of the peace respectively are thereby required, to hear and determine all such complaints, to examine witnesses upon oath, and to relieve the party so complaining of so much of his, her, or their respective payments, as shall be so made out before them to have been overpaid.

And by the 28 Geo. III. c. 37, s. 19, which recites the above mentioned clause, it is enacted, that in order to entitle the party complaining to relief, such complaints shall be laid within twelve calendar months after such sale, if the sale shall be rendered void within that time, or if the sale shall not be rendered void within that time, that then

[a] For form of warrant, see Appendix, 240.

such complaints shall be laid within three months after it is discovered that the person for whose benefit any such estate, goods, or chattels, was or were sold, had no title to the same or right to dispose thereof, and that no such complaint shall be laid, or any relief given thereupon, unless such complaint shall be laid within that time.

SECT. 6.—*Of the Auctioneer's Remedy to obtain a Return of Auction Duty which he has overpaid.*

By 38 Geo. III. c. 54, s. 3, it is enacted, that if any auctioneer shall make any over-payment for or on account of the duty arising on any sale by auction, it shall be lawful for the auctioneer making such over-payment, within twelve months next after the time of making such over-payment, to lay his complaint before the commissioners of excise, or justices of the peace within whose jurisdiction respectively such sale was made, and the said commissioners or justices respectively are thereby required to hear and determine all such complaints, to examine the witnesses upon oath which shall be produced, as well on the behalf of the party making such complaint as on the behalf of all and every other party and parties, and thereupon, or by other due proof to relieve the party so complaining, of so much of such payment as shall be so made out before them to have been overpaid.

# APPENDIX.

*Form of an Authority to an Auctioneer to sell.*

SIR,

I, the undersigned A. B., owner of the several lots mentioned in the particulars of sale hereunto annexed, do hereby give you authority to sell the same for me by public auction, at the prices respectively marked against them. Dated this day of 1826.

To Mr. C. D., auctioneer. A. B.

*Notice by the Owner of his having appointed a Person to bid for him, and by the Person so appointed of his Intention to bid accordingly.*

SIR,

I, the undersigned A. B. of &c., owner of the estates intended to be sold by you by public auction at, &c., on the day of next, do hereby give you notice that I have appointed the undersigned C. D. of, &c., to bid at such sale on my behalf or for my use; and I, the above named C. D., do hereby give you notice that I have accordingly agreed to bid at such sale for the use or on the behalf of the said A. B. Dated this day of 1826.

To Mr. E. F. auctioneer. A. B.

C. D.

*Notice by the Owner's Agent of his Intention to bid Personally.*

SIR,

I, the undersigned A. B. of, &c., agent of C. D. of, &c., owner of the estates intended to be sold by you by public auction at, &c., on the day of next, do hereby give you notice that I intend to bid at such sale for the use and on the behalf of the said C. D. Dated this day of 1826.

To Mr. C. D. auctioneer. A. B.

*Notice by the Agent of his having appointed a Person to bid, and by the Person so appointed of his Intention to bid accordingly.*

SIR,

I, the undersigned A. B. of, &c., agent of C. D. of, &c., owner of the estates intended to be sold by you by public auction at, &c., on the day of next, do hereby give you notice, that I have appointed the undersigned E. F. of, &c., to bid at such sale for the use or on the behalf of the said C. D.; and I the said E. F. do hereby give you notice that I have agreed to bid at such sale for the use or on the behalf of the said C. D. accordingly. Dated this day of 1826.

To Mr. G. H. auctioneer. A. B.

E. F.

*Conditions of Sale of Real Property.*

1. That the highest bidder shall be the purchaser; and if any dispute arise as to the last or best bidder, the

premises in dispute shall be put up at a former bidding.

2. That one bidding only be reserved to the vendor or whom he may appoint; and if no advance be made on such bidding, the premises shall be deemed to have been bought in on his account and unsold.

3. That no person shall advance less at any bidding than pounds, or retract his or her bidding.[a]

4. That the purchaser shall immediately after the sale pay to the vendor's agent a deposit of pounds per cent. in part of payment of his or her purchase money, and sign an agreement for payment of the remainder thereof to the vendor, on the day of next, at at which time and place the purchase is to be completed; and the purchaser is then to enter into the receipt of the rents and profits of the premises for his or her use, all outgoings to that time being cleared by the vendor.

5. That within from the day of the sale the vendor shall at his own expense prepare and deliver an abstract of his title to the purchaser, or his or her solicitor, and shall deduce a good title to the premises sold.[b]

6. That upon payment of the remainder of the purchase money at the time and place above mentioned, the vendor shall convey the premises to the purchaser, such purchaser at his or her own expense to prepare the conveyance to him or her, and to tender or leave the same at the office of at for execution by the vendor.

7. That the purchaser shall immediately after the sale

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[a] Ante 30, 31. [b] Ante 33, 34.

pay to the auctioneer the duties charged by act of parliament upon the sale of estates by auction.[a]

8. That a deduction, after the rate of 25 years' purchase, shall be allowed by the vendor for such outrents or annual payments as the premises shall appear to be subject to.[b]

9. That if the purchaser shall neglect or fail to comply with these conditions, his or her deposit money shall be actually forfeited to the vendor, who shall be at full liberty to resell the premises bought by him or her either by public auction or private contract, and the deficiency (if any) occasioned by such second sale, together with all expenses attending the same, shall immediately after such second sale be made good to the vendor by the defaulter at this present sale; and in case of the non-payment of the same, the whole thereof shall be recoverable by the vendor as and for liquidated damages, and it shall not be necessary for the vendor previously to tender a conveyance to the purchaser.

10. Lastly, that if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the estate, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken as the case may require, such compensation or equivalent to be settled by two referees or their umpire; each party within ten days after the discovery of the error, and

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[a] Where the property intended to be sold is exempted from the payment of auction duty, as on sales by the assignees of a bankrupt, or under the decree of the Court of Chancery, &c. this condition should be omitted.

[b] If the premises are described in the particulars as subject to the payment of any outrents or other annual payments, add "exclusively of those before mentioned."

notice thereof given by the party making such discovery to the other party, to appoint one referee by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision; if two referees are appointed, they are to nominate an umpire before they enter upon business, and the decision of such referees or umpire (as the case may be) shall be final.

*Where there are several Lots for sale, and the Title Deeds relate to them all, the following Condition is usually inserted.*

That as the title deeds, which concern the premises comprised in these particulars, relate to other estates of greater value, the purchaser of the largest part thereof, or if the largest part thereof shall not be sold the vendor, shall have the custody of the title deeds upon his entering into the usual covenants for the production thereof to the purchaser of these premises, such covenants to be prepared by and at the expense of the vendor; but all attested copies which may be required of such deeds shall be had and made by and at the joint expense of the vendor and the person or persons requiring the same.[a]

*Where the Title Deeds are intended to be retained by the Vendor, the following Condition should be inserted.*

That as the title deeds which concern this estate relate to other property of greater value, the vendor

[a] Ante 35.

shall retain the same in his custody, and enter into the usual covenants for the production of them to the purchasers, such covenants to be prepared by and at the expense of the vendor; but all attested copies which may be required of such deeds shall be had and made at the joint expense of the vendor and the person requiring the same.

*Where the Property is Leasehold it is usual to insert the following Condition:—*

That the vendor shall not be required to produce an abstract of the lessor's title, but of the original lease, and of the subsequent assignments thereof only.

*Duplicate Conditions of Sale, with a Memorandum or Agreement for the Sale and Purchase, are usually prepared and signed by both Parties, one of which is kept by each Party. The Memorandum or Agreement is usually in the following Form:—*

Memorandum, that of in the county of as agent for and on the behalf of of, &c. hath this day sold by public auction at, &c. the premises mentioned in the particulars and conditions of sale on the other half sheet to of, &c. for the sum of £ and he doth agree that the said the vendor shall in all respects fulfil on his part the said conditions of sale; and the said hath this day paid into the hands of the said the sum of £ as a deposit, and in part payment of the said sum of £ purchase money; and he doth hereby agree to pay the remaining sum of £ at aforesaid, on or before the day of next, and in all other respects on his part to fulfil the said con-

ditions of sale. As witness the hands of the parties, this day of 1826.

| | £. | s. | d. |
|---|---|---|---|
| Purchase money - - | | | |
| Deposit money - - - | | | |
| Remainder unpaid - | | | |

Witness,

*Two Sets of Conditions of Sale are frequently used; at the end of one of which, is an Agreement to be signed by the Vendor's Agent, at the end of the other, an Agreement to be signed by the Purchaser.*

*The Agreement to be signed by the Vendor's Agent is as follows:—*

I do hereby acknowledge that has been this day declared the purchaser of the premises mentioned in the particular and conditions of sale on the other half sheet, at the sum of pounds, and that he has paid into my hands pounds as a deposit, and in part payment of the said purchase money; and I do hereby agree that the vendor shall in all respects fulfil on his part the said conditions of sale. As witness my hand, this day of 1826.

| | £. | s. | d. |
|---|---|---|---|
| Purchase money - - | | | |
| Deposit money - - - | | | |
| Remainder unpaid - | | | |

Witness,

*The Agreement to be signed by the Purchaser is as follows:—*

I do hereby acknowledge that I have this day purchased by public auction the premises mentioned in the particulars and conditions of sale on the other half sheet,

for the sum of pounds, and have paid into the hands of the sum of as a deposit, and in part payment of the said purchase money; and I do hereby agree to pay the remaining sum of pounds unto at on or before the day of and in all other respects on my part to fulfil the said conditions of sale. As witness my hand, this day of 1826.

| | £. | s. | d. |
|---|---|---|---|
| Purchase money - - | | | |
| Deposit money - - - | | | |
| Remainder unpaid - | | | |

Witness,

*Conditions of Sale of Personal Property.*

1. That the highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the lot in dispute shall be put up at a former bidding.
2. That no person shall advance less at any bidding than or retract his or her bidding.
3. That the purchaser shall immediately after the sale pay into the hands of the auctioneer the auction duty, and also a deposit of ten pounds per cent. in part payment of his or her purchase money.
4. That the purchaser shall at his own expense, within one month from the day of the sale, take away the goods purchased by him, and shall pay to the vendor the remainder of the purchase money before the goods are removed.
5. That if the purchaser shall fail to comply with these conditions, the vendor shall be at liberty to resell the goods either by public auction or private contract, and the loss (if any) occasioned by such resale, together with all expenses thereby incurred, shall immediately after such second sale be made good by

the defaulter at this present sale, and in case of the non-payment thereof the same shall be recoverable as and for liquidated damages.

*Form of Warrant to repay Auction Duty, where a Sale becomes void, in consequence of the Vendor not being able to shew a good Title to the Property sold.*

*County of* } To the Collector of Excise for the collection for the time
*to wit.* } being.

Whereas complaint hath been made before us, whose names are hereunto subscribed, two of his Majesty's justices of the peace acting in and for the said county, by A. B. auctioneer, that an estate at , in the said county, was sold, on the day of last, by auction, for the benefit of C. D., and the duty of excise arising from such sale, amounting to £ , hath been paid to you the said collector of excise for the collection aforesaid; and it hath been since discovered that the said C. D. hath no title or right to dispose of the same estate or any part thereof, the truth having been this day made to appear to us the said justices, by the oaths of the said A. B. the auctioneer, and the said C. D.; and this complaint having been made within one year after the sale, [*or within three months* after discovery was made, that the said C. D. had no right to dispose of the said estate, or any part thereof,] these are therefore to authorize and require you, the said collector of excise as aforesaid, to repay the said A. B. auctioneer as aforesaid, the said sum of £ , so paid by him to you as aforesaid; and for your so doing this shall be unto you a sufficient warrant. Given under our hands and seals, this day of , in the year of our Lord

*Declaration in an Action by an Auctioneer against his Employer for Commission.*

*Lincolnshire to wit.*—A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case upon promises, for that whereas the said C. D. heretofore, to wit, on the 1st day of January, in the year of our Lord, 1826, at Horncastle, in the county of Lincoln, was indebted to the said A. B. in the sum of £ of lawful money of Great Britain, for the work and labour, care and diligence, of the said A. B. by him the said A. B. before that time done, performed, and bestowed, as the auctioneer and agent of the said C. D., in and about the selling and disposing of divers goods, wares, and merchandize, of the said C. D., and in and about other the business of the said C. D., and for the said C. D., and at his special instance and request, and being so indebted, he the said C. D. in consideration thereof afterwards, to wit, on the day and year aforesaid, at Horncastle aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said A. B. to pay him the said sum of money, when he the said C. D. should be thereunto afterwards requested. And whereas also afterwards, to wit, on the day and year aforesaid, at Horncastle aforesaid, in the county aforesaid, in consideration that the said A. B. at the like special instance and request of the said C. D., had before that time done, performed, and bestowed, other his work and labour, care and diligence, as the auctioneer and agent of the said C. D. in and about the selling and disposing of divers other goods, wares, and merchandize, and in and

about other the business of the said C. D., and for the said C. D., he the said C. D. undertook, and then and there faithfully promised the said A. B. to pay him so much money as he therefore reasonably deserved to have of the said C. D., when he the said C. D. should be thereunto afterwards requested. And the said A. B. avers, that he therefore reasonably deserved to have of the said C. D. the further sum of £ of like lawful money, to wit, at Horncastle aforesaid, in the county aforesaid, whereof the said C. D. afterwards, to wit, on the day and year aforesaid, there had notice. And whereas also the said C. D. afterwards, to wit, on the day and year aforesaid, at Horncastle aforesaid, in the county aforesaid, was indebted to the said A. B. in the further sum of £ of like lawful money, for the work and labour, care and diligence, of the said A. B., before that time done, performed, and bestowed, in and about the business of the said C. D., and for the said C. D., and at his like special instance and request. And being so indebted, he the said C. D. undertook, and then and there faithfully promised the said A. B. to pay him the said sum of money last mentioned, when he the said C. D. should be thereunto afterwards requested. And whereas also afterwards, to wit, on the day and year aforesaid, at Horncastle aforesaid, in the county aforesaid, in consideration that the said A. B. at the like special instance and request of the said C. D., had before that time, done, performed, and bestowed, other his work and labour, care and diligence, in and about other the business of the said C. D., and for the said C. D., he the said C. D. undertook, and then and there faithfully promised the said A. B. to pay him so much money as he therefore reasonably deserved to have of the said C. D., when he the said

C. D. should be thereunto afterwards requested. And the said A. B. avers, that he therefore reasonably deserved to have of the said C. D. the further sum of £ of like lawful money, to wit, at Horncastle aforesaid, in the county aforesaid, whereof the said C. D. afterwards, to wit, on the day and year aforesaid, there had notice. [*Add the usual money counts, and a count on an account stated, and breach.*]

***Declaration against an Auctioneer for not duly accounting for Goods delivered to him to sell.***

For that whereas heretofore, to wit, on, &c., at, &c., in consideration that the said A. B., at the special instance and request of the said C. D., would deliver to the said C. D. divers goods, wares, and merchandize, of great value, to wit, of the value of £ of lawful money of Great Britain, to be sold and disposed of by the said C. D., for reasonable reward to him the said C. D., in that behalf, he the said C. D. undertook, and then and there faithfully promised the said A. B. to sell and dispose of the said goods, wares, and merchandize, for the said A. B., and to render a true and just account of the sale thereof to the said A. B., and of the monies arising from such sale, whenever, after the sale thereof, he the said C. D. should be thereunto requested. And although the said A. B. confiding in the said promise and undertaking of the said C. D., did afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, deliver the said goods, wares, and merchandize, to the said C. D. for the purpose aforesaid; and although the said C. D. did afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, sell and dispose of the said goods, wares, and merchandize, for

and on the account of the said A. B. for divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £ of like lawful money. And although the said A. B. afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, requested the said C. D. so to do; yet the said C. D. not regarding his said promise and undertaking, but contriving, and craftily and subtly intending, to deceive and defraud the said A. B., in this behalf hath not rendered to the said A. B. a just and true, or other account of the sale of the said goods, wares, and merchandize, or any part thereof, but the said C. D. hath hitherto wholly refused and still refuses so to do. And whereas, also afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, in consideration that the said A. B., at the like special instance and request of the said C. D., had delivered to the said C. D, divers other goods, wares, and merchandize, of great value, to wit, of the value of £ of like lawful money, to be sold and disposed of by the said C. D. for the said A. B. for certain reasonable reward, to be therefore paid to the said C. D., he the said C. D. undertook, and then and there faithfully promised the said A. B. to render a just and true account of the said last mentioned goods, wares, and merchandize, to the said A. B., whenever afterwards he the said A. B. should be thereunto requested. And although the said C. D., then and there had and received the said last mentioned goods, wares, and merchandize, of and from the said A. B. for the purpose last aforesaid, yet the said C. D. not regarding his said last mentioned promise and undertaking, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said A. B., in this behalf hath not rendered to the said

A. B. a just and true account of the said last mentioned goods, wares, and merchandize, or any part thereof, (although the said C. D. afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, was requested by the said A. B. so to do,) but the said C. D. hath hitherto wholly refused and still refuses so to do. [*Add counts for money had and received, and on an account stated—and breach.*]

*Declaration by Vendor of a Real Estate by Public Auction, against a Purchaser for not completing the Purchase, and for not paying the Loss occasioned by a Resale.*

For that whereas the said A. B. heretofore, to wit, on, &c., at, &c. by one E. F., his auctioneer and agent, in that behalf, caused to be put up and exposed to sale by public auction, a certain close, piece, or parcel of land, with the appurtenances, situate at, &c., upon and subject to the following amongst other conditions of sale; that is to say, that the highest bidder should be the purchaser; that the purchaser should immediately pay down into the hands of the auctioneer, that is to say, into the hands of the said E. F. 10*l.* per cent. in part of his purchase money, and enter into an agreement for payment of the residue of the said purchase money, on the day of then next ensuing, at which time he should have possession of the premises, on having a good title, and that the auction duty payable to government should be paid and borne by the vendor and purchaser in equal shares, and the purchaser should pay down his share thereof to the auctioneer at the time of sale; and that in case the purchaser should fail to comply with the said conditions, the deposit money should be forfeited, and the vendor be at liberty to

resell the said close, piece, or parcel of land, with the appurtenances, and the loss, if any, occasioned by such resale, together with all charges should be made good by the defaulter; as by the said conditions of sale, reference being thereunto had, will amongst other things more fully and at large appear. And the said A. B. in fact saith, that on the said exposure to sale, to wit, on the same day and year first aforesaid, at, &c. aforesaid, the said C. D. was the highest bidder for, and then and there became, and was in due manner declared to be, the purchaser of the said close, piece, or parcel of land, with the appurtenances as aforesaid, at and for a certain large sum of money, to wit, the sum of 500*l.* And thereupon afterwards, to wit, on the day and year first aforesaid, at, &c. aforesaid, in consideration thereof, and that the said A. B., at the special instance and request of the said C. D., had then and there undertaken, and faithfully promised the said C. D. to perform and fulfil all things in the said conditions of sale, contained on the part of the vendor, to be performed and fulfilled, he the said C. D. undertook, and then and there faithfully promised the said A. B. to perform and fulfil every thing in the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled. And although the said C. D. in part performance of the said terms and conditions of sale, and of his said promise and undertaking, did then and there pay down a certain sum of money, to wit, the sum of 50*l.* being at and after the rate of 10*l.* per cent. as a deposit upon and in part payment of the said purchase money; and did then and there sign an agreement for the payment of the remainder of the said purchase money, on or before the said day of in the year of our Lord aforesaid, on having a good title, to wit,

at, &c. aforesaid. And although the said A. B. for a long time before, and upon, and after the said day of in the year last aforesaid, was ready and willing to make, and did make appear to the said C. D., a good and sufficient title in fee simple of, in, and to the said close, piece, or parcel of land, with the appurtenances, so as to enable him the said A. B. to convey the same to the said C. D. in fee simple as aforesaid, and to execute, and cause to be executed, proper conveyances thereof to the said C. D. and afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, offered to the said C. D. to make and convey to him such good and sufficient title in fee simple to the said close, piece, or parcel of land, with the appurtenances, upon payment of the remainder of the said purchase money, according to the said terms and conditions of sale, to wit, at, &c. aforesaid; yet the said C. D. not regarding the said terms and conditions of sale, nor his said promise and undertaking, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said A. B. in this behalf, did not, nor would, on or before the said day of in the year of our Lord aforesaid, on having such good title as aforesaid, or at any other time, pay or cause to be paid to the said A. B. the remainder of the said purchase money, or any part thereof, but then and there wholly neglected and refused so to do, and there wholly refused, then or at any other time, to complete the said purchase, or to accept a conveyance of the said close, piece, or parcel of land, with the appurtenances, to him the said C. D.; and thereupon the said A. B. afterwards, and after the said day of in the year last aforesaid, to wit, on, &c. at, &c. aforesaid, according to and by virtue of the said conditions of sale, again exposed the said close,

piece, or parcel of land, with the appurtenances, to sale by public auction, under and subject to certain terms and conditions of sale, and the same were then and there, at such last mentioned exposure to sale as aforesaid, re-sold for a much less price or sum of money than the said price or sum for which the same had been so sold to the said C. D. as aforesaid, to wit, for the sum of 400*l.* whereby there then and there was a deficiency between the said price for which the said close, piece, or parcel of land, with the appurtenances, were so sold to the said C. D. as aforesaid, and the said price for which the same were so sold on such resale to a large amount, to wit, to the amount of 100*l.*; and the charges attending such resale, then and there amounted to a certain other large sum of money, to wit, the sum of 100*l.* of all which said premises the said C. D., afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice, and by reason of the premises, and according to the said terms and conditions of sale, he the said C. D. then and there became liable to pay, and ought to have paid, to the said A. B. the said several sums of 100*l.* and 100*l.* to wit, at, &c. aforesaid; yet the said C. D. further disregarding the said conditions of sale, and his said promise and undertaking, hath not (although he was afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, requested by the said A. B. so to do) as yet paid the said sums of 100*l.* and 100*l.* or either of them, or any part thereof, but so to do, hath hitherto wholly refused and still doth refuse, to wit, at, &c. aforesaid.

And whereas also heretofore, to wit, on the day and year first aforesaid, to wit, at, &c. aforesaid, the said A. B. at the special instance and request of the said C. D., bargained and agreed to sell to the said C. D., and the said C. D. then and there bought of the said

A. B. a certain other close, piece, or parcel of land, with the appurtenances, at and for a certain price or sum of money, to wit, the sum of 500*l.* upon the terms and conditions following, that is to say, that the said C. D. should pay down immediately a deposit of 10*l.* per cent. in part of the purchase money, and should pay the remainder on or before the day of then next, on having a good title; and that the said C. D. should have proper conveyances, together with such attested copies as might be thought necessary, at his own expense, on payment of the remainder of the purchase money. And thereupon heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration of the premises, and that the said A. B. at the special instance and request of the said C. D. had then and there undertaken, and faithfully promised the said C. D. to perform and fulfil all things in the said last mentioned conditions of sale contained, on the part of the vendor to be performed and fulfilled, he the said C. D. undertook, and then and there faithfully promised the said A. B. to perform and fulfil every thing in the said conditions of sale on his part and behalf as such purchaser, as last aforesaid to be performed and fulfilled. And although the said C. D. in part performance of the said last mentioned terms and conditions, and his said last mentioned promise and undertaking, did then and there pay down a deposit of 10*l.* per cent. in part of the said last mentioned purchase money; and although the said A. B. before and on the said day of was ready and willing to make and convey to the said C. D. a good and sufficient title to the said last mentioned close, piece, or parcel of land, with the appurtenances, and to procure to be executed to him the said C. D. at the expense of the said C. D. proper conveyances thereof, with such

attested copies as should be thought necessary, according to the said last mentioned terms and conditions, on payment of the remainder of the said last mentioned purchase money, and to perform and fulfil the said last mentioned terms and conditions, and his said last mentioned promise and undertaking in every thing on his part and behalf to be performed and fulfilled, to wit, at &c. aforesaid; whereof the said C. D. afterwards, to wit, on the day and year last aforesaid, there had notice; yet the said C. D. not regarding the said last mentioned conditions of sale, nor his said last mentioned promise and undertaking, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said A. B. in this behalf did not nor would, on or before the said day of or at any other time, pay the remainder of the said last mentioned purchase money, or any part thereof, to the said A. B., but then and there wholly neglected and refused so to do, and afterwards, to wit, on the said day of in the year aforesaid, wholly refused to complete the said last mentioned purchase, and wholly discharged the said A. B. from all further performance on his part of his said last mentioned promise and undertaking, contrary to the said last mentioned promise and undertaking of the said C. D., to wit, at, &c. aforesaid. [*Here add such other special counts as the particular circumstances of the case may require.*]

And whereas also the said C. D. heretofore, to wit, on the day and year first aforesaid, to wit, at, &c. aforesaid, was indebted to the said A. B. in the further sum of 500*l.* of good and lawful money of Great Britain, for a certain other close, piece, or parcel of land, with the appurtenances, of the said A. B., before that time bargained and sold by the said A. B. to the said C. D., and

at his special instance and request; and being so indebted he the said C. D. in consideration thereof afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said A. B. to pay him the said last mentioned sum of money, when he the said C. D. should be thereunto afterwards requested. And whereas also afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said A. B. at the like special instance and request of the said C. D. had before that time bargained and sold to the said C. D. a certain other close, piece, or parcel of land, with the appurtenances, of the said A. B., he the said C. D. undertook, and then and there faithfully promised the said A. B. to pay him so much money as he therefore reasonably deserved to have of the said C. D., when he the said C. D. should be thereunto afterwards requested. And the said A. B. avers, that he therefore reasonably deserved to have of the said C. D. the further sum of 500*l.* of like lawful money, to wit, at, &c. aforesaid, whereof the said C. D. afterwards, to wit, on, &c. last aforesaid, there had notice. [*Add counts for money paid, and on an account stated.*]

*Declaration by the Purchaser against the Vendor of a Real Estate at public Auction for not making a good Title, with a second Count for not delivering an Abstract of good Title in due time.*

For that whereas the said C. D. heretofore, to wit, on, &c. at, &c. caused to be put up and exposed to sale by public auction, a certain messuage or tenement, and divers, to wit, acres of land, with the appurtenances, situate, &c. [*describe the premises as in the conditions of sale*] upon and subject to the following amongst other

conditions, that is to say, that the purchaser should pay to the vendor or his agent, a deposit of 10*l.* per cent. in part of the purchase money, and should likewise pay one half of the auction duty, and should also pay the remainder of the purchase money, and complete the purchase on or before the day of then next, and that a good title should be made out at the expense of the vendor, and upon payment of the remainder of the purchase money, a proper conveyance at the purchaser's expense. And the said A. B. in fact saith, that on such exposure to sale as aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid, he the said A. B. became and was the purchaser of the said tenements, with the appurtenances, upon and according to the said conditions, for a certain price, to wit, the sum of £ of lawful, &c. and then and there paid to the said C. D. a large sum of money, to wit, the sum of £ as a deposit of 10 per cent. in part of the said purchase money, and then and there also paid another large sum of money, to wit, the sum of £ of like lawful money, as one half of the auction duty payable in that behalf. And thereupon afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said A. B. at the special instance and request of the said C. D., had then and there undertaken, and faithfully promised the said C. D. to perform and fulfil all things in the said conditions of sale contained, on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled: he the said C. D. undertook and faithfully promised the said A. B. to perform and fulfil all things in the said conditions of sale contained, on the vendor's part and behalf to be performed and fulfilled. And the said A. B. saith, that although he on, &c. aforesaid (*the first day*) and from thence until and upon the said day of

then next, at, &c. aforesaid, was ready and willing to perform and fulfil all things in the said conditions contained, on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled, and to pay the remainder of the said purchase money, and to complete the said purchase, whereof the said C. D. on, &c. last aforesaid, there had notice, and was then and there requested by the said A. B. to make to him a good title to the said messuage, &c.; yet the said C. D. not regarding, &c. but contriving, &c. did not nor would, when he was so requested as aforesaid, or at any time before or since, make or procure to be made to the said A. B. a good title to the said messuage, &c. but hath hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid, contrary to the said conditions of sale and the said promise and undertaking of the said C. D, by reason whereof he the said A. B. hath been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and hath been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of £. of like lawful money, in endeavouring to procure such title as aforesaid, and to get the said purchase completed, and hath lost all gains and profits which he might and otherwise would have made and acquired from using and employing the said sum of money so paid by him as deposit and duty as aforesaid, and other monies provided and kept by him the said A. B. for the completion of the purchase, to wit, at, &c. aforesaid. And whereas also heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said A. B., at the special instance and request of the said C. D., had then and there bargained with the said C. D. for the purchase of a certain other messuage or tenement, and divers, to wit, other acres

of land, with the appurtenances, at and for a large sum of money, to wit, &c. and had paid to the said C. D. a certain sum, to wit, &c. in part of the last mentioned purchase money, and had also agreed to pay the residue thereof, and accept a proper conveyance of the said last mentioned messuage, &c. on or before the day of in the year aforesaid, on having a good and valid title made to him to the said messuage, &c.; he the said C. D. then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, &c. that he the said C. D. would procure an abstract of a good and valid title to the said last mentioned messuage, &c. to be furnished to the said A. B. in due and convenient time, for enabling him to get such title examined, and a proper conveyance of the same messuage, &c. prepared, and the said last mentioned purchase completed on or before, &c. aforesaid; yet the said C. D. not regarding, &c. did not nor would, although, &c. procure an abstract of a good and valid title to the said last mentioned messuage, &c. to be furnished to the said A. B. in due and convenient time, for enabling him to get such title examined, and a proper conveyance of the same messuage, &c. prepared, and the said last mentioned purchase completed on or before, &c. aforesaid, but therein wholly failed and made default, to wit, at, &c. aforesaid; and the said C. D. then and there wrongfully and injuriously neglected and omitted to furnish any abstract of title to such messuage, &c. as last aforesaid, for a long and unreasonable time, and until an insufficient and inadequate time remained for the examination of such title, and for the preparation of a proper conveyance, and the completion of such purchase as last aforesaid, by the day appointed for that purpose as aforesaid, according to the said last mentioned promise of the said C. D. in that behalf; and the said

A. B. in fact, further saith, that by means and in consequence of such neglect and omission as aforesaid, and by reason of E. F. (without whose joining in the conveyance of the said last mentioned messuage, &c. a good title thereto could not be made) having since departed this life, to wit, at, &c. aforesaid, the said A. B. hath been deprived of all benefit and advantage, which would have arisen to him from the completion of the said last mentioned purchase, and hath necessarily been put to great expenses, amounting in the whole to a large sum of money, to wit, &c. in endeavouring to procure the said title, as last aforesaid, and hath lost all gains and profits which he might and would otherwise have made and acquired, from using and employing the said sum of money so paid by him as a deposit as aforesaid, and other monies provided and kept by him the said A. B. for the completion of the purchase, to wit, at, &c. aforesaid. [*Add counts for money paid, had, and received—account stated—and breach.*]

*Declaration at the Suit of a Vendor against a Purchaser by Public Auction, for not taking away Goods within a specified Time.*

For that whereas the said A. B. heretofore, to wit, on, &c. at, &c. put up and exposed to sale by public auction in lots, amongst other goods and merchandize, a large quantity of pimento, then lying and being at a certain warehouse, situate and being at, &c. under and subject to the following conditions of sale, that is to say, that, &c. [*set out the conditions of sale*] as by the said conditions of sale, reference being thereunto had, will more fully and at large appear. And the said A. B. in fact saith, that upon the said exposure to sale as aforesaid, to wit, on, &c. at, &c. aforesaid, the said C. D.

became and was the highest bidder for, and declared the purchaser of a certain lot of goods, called lot 4, parcel of the said goods and merchandize so put up and exposed to sale, under and subject to the said conditions as aforesaid, consisting of divers, to wit, 10 bags of pimento, at and for a certain sum of money, to wit, the sum of £ then and there bid by the said C. D. for the same. And thereupon afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration of the premises, and also in consideration that the said A. B. at the special instance and request of the said C. D. had then and there undertaken, and faithfully promised the said C. D. to perform and fulfil all things in the said conditions of sale contained, on the part of the vendor to be performed and fulfilled, he the said C. D. undertook, and then and there faithfully promised the said A. B. to perform and fulfil every thing in the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled. And although the said lot of pimento at the time the same was purchased by the said C. D. as aforesaid, was and from thence continually until, and upon and after the said day of remained and continued in the said warehouse; and although the said A. B. hath always, from the time of the said putting up and exposing to sale of the said goods and merchandize as aforesaid, hitherto, been ready and willing to suffer and permit, and would have suffered and permitted the said C. D. to take and clear away the said lot of pimento so purchased by him as aforesaid, from the said warehouse, on payment of the said purchase money for the same, together with the sum of £ for the charges and delivery of the said lot, to the said C. D. the same being a reasonable sum in that behalf; and the said pimento was during all that time lotted out for him the

said C. D.; and although the said A. B. hath always from the time of making his said promise and undertaking, hitherto well and truly performed and fulfilled the said conditions of sale, in all things therein contained on his part and behalf, as the seller of the said lot of pimento, to be performed and fulfilled, to wit, at, &c. aforesaid; yet the said C. D. not regarding his said promise and undertaking so made as aforesaid, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said A. B. in this behalf, did not nor would (although often requested so to do), on or before the day of or at any time afterwards, take or clear away the said lot of pimento from the said warehouse, or pay the said purchase money for the same, together with the said sum of £ so being the reasonable charge of delivery of the said lot to the said C. D. as aforesaid, or any or either of them, or any part thereof, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid, whereby the said A. B. hath not only lost and been deprived of the benefit of the said sale, but, in order to take care of the said lot, hath been forced and obliged to stow, place, and keep the same in the said warehouse, to wit, at, &c. aforesaid. [*Add such other special counts as the case may require, and counts for warehouse-room, goods bargained and sold, and on an account stated.*]

***Declaration at the Suit of a Vendor against a Purchaser of Goods by public Auction, where the Goods have been resold according to the Conditions of Sale.***

(As in the last precedent to the asterisk, and then proceed as follows.) And although the said lot of pimento,

at the time the same was purchased by the said C. D. as aforesaid, was, and from thence continually until and upon the said day of remained and continued in the said warehouse, and although the said A. B. was always, from the time of the said putting up and exposing to sale of the said goods and merchandize as aforesaid, until and upon the said day of ready and willing to permit and suffer, and would have permitted and suffered the said C. D. to take and clear away the said lot of pimento so purchased by him as aforesaid, from the said warehouse, on payment of the said purchase money for the same, together with the sum of £ for the charges of the delivery of the said lot to the said C. D., the same being a reasonable sum in that behalf; and the said lot of pimento was during all that time lotted out for him the said C. D.; and although the said A. B. hath always from the time of making his said promise and undertaking, hitherto, well and truly performed and fulfilled the said conditions of sale, in all things therein contained on his part and behalf, as the seller of the said lot of pimento, to be performed and fulfilled, to wit, at, &c., aforesaid; and although he the said C. D., in pursuance of the said conditions of sale, ought to have cleared away and paid for the said lot of pimento, within the space of fourteen days from the said putting up and exposing to sale as aforesaid, yet the said A. B., in fact saith, that the said C. D. (although often requested) did not nor would, at any time within the said space of fourteen days, or at the expiration thereof, clear away or pay for the said lot of pimento or any part thereof, according to the said conditions of sale, and his said promise and under-

taking so by him made as aforesaid; but on the contrary thereof, he the said C. D. suffered and permitted the said lot of pimento to remain uncleared, without paying for the same, at and after the expiration of the said fourteen days, (being the time by the said conditions of sale, limited for clearing away the same,) and thereupon afterwards, and after the expiration of the said space of fourteen days, and whilst the said lot of pimento remained uncleared and unpaid for, as aforesaid, to wit, on, &c. at, &c. he the said A. B. according to the said conditions of sale, and in pursuance thereof, resold the same, that is to say, by public sale, at and for a much less price or sum of money than the said price or sum for which the same had been so sold to the said C. D., to wit, for the sum of £ whereby there then and there was a deficiency between the said price, for which the said lot of pimento was so sold to the said C. D.; and the said price for which the same was so sold on such resale, amounting to a large sum of money, to wit, the sum of £ over and besides the charges attending such resale, amounting to a certain other sum of money, to wit, the sum of £ and making together with the said sum of £ the sum of £ of lawful money of Great Britain, of all which said several premises the said C. D. afterwards, to wit, on, &c. at, &c. had notice, and was then and there requested by the said A. B. to pay him the said sum of £ and which said sum of £ he the said C. D. then and there ought to have paid to the said A. B., according to the said conditions of sale, and his said promise and undertaking so by him in manner and form aforesaid made. [*Add such other special counts as the case may*

*require, counts for warehouse-room, goods bargained and sold, usual money counts, and a count on an account stated.*]

*Declaration at the Suit of a Purchaser against an Auctioneer, for not delivering Goods sold by him by public Auction.*

For that whereas the said C. D. heretofore, to wit, on, &c. at, &c. put up and exposed to sale by public auction, a certain horse, upon and subject to the following amongst other conditions, that is to say, that the purchaser should immediately after the sale pay a deposit of £5 per cent. in part of his purchase money, and that the said horse should be taken away by the purchaser in three days, upon payment of the remainder of the purchase money; and the said A. B. in fact saith, that on such exposure to sale as aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid, he the said A. B. became and was the purchaser of the said horse, upon and according to the said conditions, for a certain price, to wit, the sum of £100, of lawful money of Great Britain, and then and there paid to the said C. D. a large sum of money, to wit, the sum of £5, as a deposit of £5 per cent. in part of the said purchase money; and thereupon afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said A. B., at the special instance and request of the said C. D., had then and there undertaken and faithfully promised the said C. D. to perform and fulfil all things in the said conditions of sale contained, on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled, he the said C. D. undertook

and faithfully promised the said A. B. to perform and fulfil all things in the said conditions of sale contained, on the vendor's part and behalf, to be performed and fulfilled. And the said A. B. saith, that although he on, &c. aforesaid, at, &c. aforesaid, and from thence, until and at and after the expiration of the said fourteen days, was ready and willing, and offered to perform and fulfil all things in the said conditions contained, on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled, and to pay the remainder of the said purchase money, and to complete the said purchase, whereof the said C. D. on, &c. there had notice, and was then and there requested by the said A. B. to deliver to him the said horse; yet the said C. D. not regarding his said promise and undertaking so by him made as aforesaid, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said A. B. in this behalf, did not nor would, when he the said C. D. was so requested as aforesaid, or at any time before or since, deliver to the said A. B. the said horse, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid, contrary to the said conditions of sale, and the said promise and undertaking of the said C. D.; by reason whereof he the said A. B. hath been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and hath been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of £ of like lawful money, in endeavouring to procure the delivery of such horse as aforesaid, and to get the said purchase completed, and hath lost all gains and profits which he might and otherwise would have made and acquired, from using

and employing the said sum of money so paid by him as a deposit as aforesaid, and other monies provided and kept by him the said A. B. for the completion of the said purchase, to wit, at, &c. aforesaid. [*Add counts for money had and received, on an account stated—and breach.*]

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